Supreme Court, U.S.
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No. 96-_____

In The
Supreme Court of the United States
October Term, 1996

JOYCE YVONNE SHINN and JOHN EUGENE SHINN
on behalf of Jonathan Daniel Shinn,
Petitioners

vs.

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT,
KENNETH WILBANKS, RAY CHANCELLOR, BOB CURRY
and WILLIAM DORNBURG,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

QUESTION PRESENTED NUMBER ONE:

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER FAILED TO STATE A PROPER CLAIM UNDER 42 U.S.C.A. § 1983 AS:

A. Jonathan Shinn did have a constitutionally protected liberty interest in being "free from emotional harassment caused by the intentional and/or reckless behavior of Respondent Wilbanks.

B. Jonathan Shinn did have a constitutionally protected liberty interest in being free from punishment absent his personal guilt

C. the Appellate Court erred by holding that no exercise of protected free speech occurred by minor appellant Jonathan Shinn for which he was punished.

D. As Petitioner states a valid constitutional claim, qualified immunity may not attach.

QUESTION PRESENTED NUMBER TWO:

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S APPEAL WAS FRIVOLOUS AS LEGAL POINTS ARGUABLE ON THE MERITS EXIST AND JUSTICIABLE QUESTIONS WERE PRESENTED TO THE COURT OF APPEALS.

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported, 96 F.3d 783 and is reprinted in the Appendix at 1.

JURISDICTION

This Court has jurisdiction over this petition for a writ of certiorari from a decision of the Fifth Circuit Court of Appeals under the provisions of 28 U.S.C. 1254(1). Federal Jurisdiction is proper under U.S. Const. Art. III, 28 U.S.C.A. § 1331. The decision of United States Court of Appeals, Fifth Circuit was filed October 3, 1996. This petition for certiorari was timely filed within ninety (90) days of that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT ONE
UNITED STATES CONSTITUTION AMENDMENT FOURTEEN
42 U.S.C.A. § 1983
FEDERAL RULES OF APPELLATE PROCEDURE, RULE 38

STATEMENT OF THE CASE

PROCEEDINGS BELOW:

Petitioners appealed to the Fifth Circuit Court of Appeals after a United States District Court of the Southern District of Texas dismissed Petitioner's case for failure to state a claim on which relief could be granted. The Court of Appeals affirmed the District Court's decision on October 3, 1996, holding that Petitioners failed to state a claim and that Petitioner's appeal was frivolous. The Court of Appeals ordered that reasonable attorney's fees and double costs be awarded to Respondents as damages, pursuant to F.R.A.P. Rule 38. It is from the Court of Appeal's decision that Petitioners request certiorari be granted and that the order of the Court of Appeals be reversed with the case being remanded for the completion of discovery and trial.

FACTS:

Joyce Yvonne Shinn and John Eugene Shinn brought this suit on behalf of their minor son, Jonathan Daniel Shinn (Jon). Jon, then a freshman at A & M Consolidated High School, was a member of the high school band under Respondent Wilbanks. Jon was a very talented musician who for many years had earned numerous awards for his abilities, including many first division ratings at regional junior high and high school competitions. However Jon's ability to learn and grow, as well as his enthusiasm for music began dying in late Summer of 1992.

The August 3, 1992 summer band practice began for Jon under the instruction of Director Wilbanks. All of the students immediately noticed a problem with their new

instructor. He was undisciplined and provided no leadership. Consequently, the band practices became both disruptive and highly unproductive. (App. 13-15).

To make matters worse, Mr. McSpadden, the assistant band director, had earlier agreed with the Shinns that Jon should be permitted to develop his talents and play a variety of instruments during his first years of band. Unexpectedly, Wilbanks unilaterally decided that Jon would play only the B-flat clarinet. In addition to dampening his morale, these types of decisions limited Jon's ability to grow and learn within the band program. (App. 13-15)

By September 1992, it had been reported to various parents by their children that Respondent Wilbanks was allowing older students to "haze" younger members of the band, that Wilbanks continually yelled at students in practice, and that he publicly showed disrespect to the well-liked assistant director McSpadden. The Shinns immediately reported their son's reports to Dr. Cunningham, a school administrator. After this, the Shinns spoke with many members of the community and learned that Wilbanks had a very controversial and troubled work history. Wilbanks reportedly had a history of band instrument inventory problems, poor rapport with students and verbally abusing others. These problems were later confirmed by individuals in other districts as well. Additionally, at A&M Consolidated High School Wilbanks reportedly had been witnessed going into the girls dressing room while girls were in there. (App. 15-16).

On October 13, 1992, the band students protested Wilbanks' performance as band director by refusing to go to class that day. The parents of the students became highly concerned,

and wondered how Wilbanks had been hired as the school band director and music coordinator. The parents began lodging many complaints with Assistant Principal Chrissy Hester. (App. 15).

Because tensions were running high between Wilbanks and the band, it was feared that Wilbanks might actually harm someone. By mid-October 1992, Wilbanks had focused increasingly more hostility at Jon. On October 16, Wilbanks verbally abused and ridiculed Jon in front of others. This public ridicule and abuse began taking its toll on Jon, and continually decreased his ability to perform well. (App. 8).

Then in November 1992, the school administration set up a meeting in response to the school board's request that Dr. Chancellor resolve the "band problem." In late November a letter was released ostensibly on behalf of Wilbanks and signed by Mr. McSpadden. It turned out that McSpadden had not written the letter and it was rumored that he had been forced to write the letter by Wilbanks and Superintendent Curry. The entire meeting to remedy the problem had been one big cover-up. (App.16-17).

In the following months, Wilbanks continued to allow older band members to haze John Shinn. (App.16-19) Appellants were distressed with Wilbanks endorsement of hazing, his behavior during an "out of town" trip, and that his practices were accepted by the school administration. (App. 19).

As a result of complaints filed by Appellants with the Texas Education Agency, hereinafter (T.E.A.), a T.E.A. investigation was conducted in which it was found as fact that "all music personnel interviewed, except McSpadden stated to the investigation that if Mr. Wilbanks returns to the district

next year they would not return to work." Also the official report stated that Ms. Chrissy Hester, assistant principal, "had the best overall understanding of the situation," and had serious concerns relating to Wilbanks as a teacher. Even with these findings, the administration took no immediate action. That report was published in the local newspaper with reports of Petitioners involvement. (App. 17-18).

Then in March 1993, the Board secretly voted to remove Wilbanks from the classroom. However, he was not removed. Two days later, the local paper ran a story about the Shinns' complaints and the resulting T.E.A. investigation. Immediately thereafter, Wilbanks critically lectured the band about the article. Throughout his tirade, Wilbanks directed his comments to Jon and another student, both of whose parents had been instrumental in bringing about the T.E.A. investigation. In addition to everything else Wilbanks had done, this public chastisement and criticism caused Jon much pain and embarrassment. (App. 17-18).

The parents became insistent that the administration follow the Board's ruling to take Wilbanks out of the classroom. Finally, on March 29, 1993, Defendant Wilbanks was reassigned; however, despite the order, the administration allowed him to teach a percussion class at Oakwood Middle School. Less than three weeks later, the Board reinstated Wilbanks to the classroom for the remainder of the year. In reinstating Wilbanks, the Board ratified his actions and "systems." (App. 18-19).

By the end of the year, parents had discovered that Wilbanks had been engaging in questionable if not illegal activity with the band instruments earlier in the year. The activity reported to Chrissy Hester was consistent with the reports received from other districts regarding Defendant

Wilbanks. Then, on May 1, 1993 as Jon attempted to return his band instrument, Wilbanks physically threatened Jon and verbally punished and harassed him as he tried to walk past. (App. 18-19) This callously indifferent, if not intentional, behavior of Wilbanks resulted in severe emotional distress upon Jon Shinn. (App. 18-19).

ARGUMENT

QUESTION PRESENTED NUMBER ONE:

The Fifth Circuit Court of Appeals erred in holding that Petitioner failed to state a proper claim under 42 U.S.C.A. § 1983.

The Fifth Circuit Court of Appeals dismissed Petitioner's claim as frivolous because it viewed Petitioner as merely someone who feels they have been treated "wrongfully and unfairly." They tell us that Petitioners do not state a constitutionally protected right. What they do not state is that Liberty Interests arise from state law, not only the Constitution. See ***Board of Regents of State Colleges v. Roth***, 408 U.S. 565, 577 (1972). Fourteenth Amendment property interests are not created by the Constitution, but "stem from an independent source such as state law." ***Id.*** The Fifth Circuit has, in the past, commanded us to look to Texas state law for a protected property interest. ***Garcia v. Reeves County Tex.***, 32 F.3d 200, 203 (5th Cir. 1994). Constitutional interests have been created through state prison statutes for example, ***Welch v. Thompson***, 20 F.3d 636 (5th Cir. 1994), citing ***Olim v. Wakinekona***, 461 U.S. 238, 249 (1983). Thus State law may determine whether such a liberty interest exists.

Accordingly, Texas case law recently held that actual

physical injury to a student by his school officials is not required to maintain a constitutional claim. ***Spacek v. Charles***, 928 S.W.2d 8, 93 (Tex. App.— Houston [14th Dist. 1996). The ***Spacek*** court stated:

We also find unpersuasive ***Spacek's*** argument that because [student] Maxey did not receive a physical injury that was more than de minimus , his allegations of abuse do not rise to the level of a constitutional violation. Whether an injury is more than de minimus is determined within the context of contemporary standards of decency, and not by the significance of the injury. See, ***Hudson v. McMillian***, 503 U.S. 1, 8, 112 S.Ct. 995, 999 -1000; 117 L.Ed. 2d 156 (1992). Furthermore actual physical injury is not required to maintain a constitutional claim. See, ***Jefferson v. Ysleta Independent School Dist.***, 817 F2d 303, 304 (5th Cir. 1987) (rejecting a defense of qualified immunity in the public school context where the complainant alleged injuries of humiliation, mental anguish, and inability to study after being tied to a chair for and entire school day as an educational exercise.

Id. The liberty interest to be free from emotional harassment caused by the intentional and/or reckless behavior of [Respondent] Wilbanks.." or "severe emotional distress..." which Petitioners claim to be constitutionally protected was recognized by at least the Texas Court in ***Spacek***, albeit in slightly different wording.

In light of Texas state law, Appellants brought a viable Fourteenth Amendment claim for the violation of Jonathan Shinn's liberty interest. In fact, Shinn has three valid arguable constitutionally protected interests at stake in this case which the lower courts have turned a deaf ear to. They are as follows:

A. There is a constitutionally protected liberty interest in being "free from emotional harassment" caused by intentional and/or reckless behavior.

Constitutional protections from the incursions of ever-burgeoning government, whether federal or state, may be so refined as to prevent any individual from enjoying constitutional liberties.

In this case, the Court of Appeals was apparently convinced that the Shinn's story was that of a one of many troublesome nit-pickers, "We provide the detailed description of the Plaintiffs' allegations in order to demonstrate that a constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly." (App. 9). In fact, Constitutionally protected liberty interests are indeed broad and varied. ***Meyer v. Nebraska***, 262 U.S. 390 (1923); See also ***Doe v. Taylor Indep. School Dist.,*** 15 F.3d 443, 449 (5th Cir. 1993). They are not defined by federal law but exist as the result of and are found in state law (whether constitutional, statutory or case), the private agreements of the parties, widespread policies or practices within the particular enterprise of government under scrutiny. ***See Board of Regents of State Colleges v. Roth***, 408 U.S. 565, 577 (1972); ***Perry v. Sindermann***, 408 U.S. 593, 602, 604 (1972) (stating that property interests may derive from state law). In both cases the availability of 14th Amendment Rights turned on questions of state law.

The Fifth Circuit has noted that, within the context of Texas, school children occupy a special place within the ambit of protection afforded by law. Physical misbehavior by teachers toward minor students is proscribed whether that misbehavior takes place in the form of: the lashing of a

second grade student to a chair for two days, ***Jefferson v. Ysleta Indep. Sch. Dist.***, 817 F.2d 303 (5th Cir. 1987); the infliction of corporal punishment in public schools which is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." ***Fee v. Herndon***, 900 F.2d 804 (5th Cir.), ***Woodard v. Los Fresnos Indep. Sch. Dist.***, 732 F.2d 1243 (5th Cir. 1984), cert. Den. 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990); a school employee's failure to intervene in the beating of a student on the school bus by a third person, ***Lopez v. Houston Indep. Sch. Dist.***, 817 F.2d 351 (5th Cir. 1987); or the sexual exploitation of minors by a school employee, ***Doe***, supra.

In Texas the Attorney General has opined in a published opinion that "abuse" is generally defined as "improper use or maltreatment" and that the standard of child abuse is not limited by language to require only serious physical injury; rather the law is broadly written to encompass injuries which result from abuse or neglect. A.G. Opin. H-986, May 2, 1977.

What, then, is the statutory law in Texas which is so broadly written and is a source of protected liberties? It is the Texas Family Code, Title 2 § 34.012 et. seq, V.A.T.S.

That statute provides in part that "Abuse" includes the following acts or omissions by any person [including school personnel]: mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning."
Respondent Wilbanks, a band teacher newly hired by the Appellee school district for the 1992-93 school year is the focus of Appellants' suit.

It is uncontroverted that Wilbanks' behavior was disruptive and generated turmoil among band students, their parents, and district faculty members.

It is uncontroverted that Respondent Chancellor, Superintendent of the school district, when checking Wilbanks' prior public school references learned that Wilbanks had at least formerly experienced problems with band instrument inventory and supervisory personnel.

It is uncontroverted that the Texas Education Agency, when investigating the complaints of Petitioners and others about Wilbanks' performance, found as a fact that ".. all music personnel interviewed except [Wilbanks' subordinate] Mr. John McSpadden, High School Assistant Band Director, [had] stated to the [T.E.A.] investigation team that if Mr. Wilbanks returned to the district next year [1993-94 school year] they would not return to work for the district."

While it is controverted in Respondents' Answer that High School Assistant Principal Chrissy Hester had "voiced her concern relating to Wilbanks as a teacher," it is uncontroverted that the T.E.A. report on its "Investigation of a Complaint Against College Station Independent School District filed by Yvonne Shinn [Petitioner]" (App. 21-36) found that "Ms. Chrissy Hester, high school assistant principal was interviewed at the request of Mr. MacGilvray, Board president, who felt that Ms. Hester had the best overall understanding of the situation, and also that Ms. Hester was an individual of especially good perception and judgment. Ms. Hester voiced several concerns relating to Mr. Wilbanks as a teacher and also concerns relating to the situation in which Mr. Wilbanks was hired by the district." (App. 26-28).

It is uncontroverted that Appellants complained about Wilbanks behavior to the district's administration, and the T.E.A.

It is uncontroverted that Appellants complaints to the T.E.A. were circulated by the T.E.A. to the local newspaper which published them.

Appellant Yvonne Shinn's affidavit attested to the emotional distress of her son during the ten months when she was under Mr. Wilbanks' [sic] supervision..." (App. 13-14), and that after the local newspaper revealed the T.E.A. report in Ms. Shinn's complaints against Wilbanks, that Wilbanks openly acted toward Jonathan Shinn so as to prompt assistant principal Hester to telephone Ms. Shinn about her son's distress. (App. 17-19).

Obviously, Wilbanks fostered significantly more than what in the vernacular is described as "a bad hair day," and is more than just "feeling wronged or treated unfairly." Surely alert parents are not to be left unheard until sordid acts by unstable school employees occur and indifferent administrators make "perverse" claims of irresponsibility as ins ***Doe,*** supra.

B. Jonathan Shinn did have a constitutionally protected liberty interest in being free from punishment absent his personal guilt

An instructive case the matter before this court is ***St. Ann. V. Palisi***, 495 F.2d 423 (5th Cir. 1974) in which innocent minors were punished by suspension from school by reason of their parents' conduct in violation of an

unconstitutional, written school board regulation.

St. Ann. at 426-427, clearly states that personal guilt is a necessary prerequisite to punishment by a governmental entity and that the requirement of "personal guilt is a fundamental element in the scheme of liberty," not reserved for activation only by the violation of a federal statute or constitutional right. The Fifth Circuit plainly noted that such a "syllogism is, of course, irrelevant and erroneous and must be rejected. The argument is irrelevant because the children do not complain that they were denied the constitutional right tot an education but that they were punished without being personally guilty. Thus a cardinal notion of liberty is involved and substantive due process is applicable." ***Id.***

In this case, Wilbanks publicly humiliated Jonathan Shinn in class on March 24, 1993 as a result of Yvonne Shinn's publicized involvement in T.E.A.'s investigation of Respondent Wilbanks. That act preceded Wilbanks' assigned removal from the classroom on March 29, 1994; upon his subsequent return to the classroom on April 20, 1993, his harassment of Jonathan Shinn resumed.
The punishment of a person may be accomplished through verbal criticism; when criticism of a minor is given publicly by an adult authority figure, it is as devastating as corporal punishment, if not more permanent.

For whatever reason, Wilbanks had been merely petty and mean prior to March 24, 1993; on that day when he publicly criticized Jonathan Shinn because of his mother's speech (complaints) to the T.E.A. his pettiness became mean-spirited punishment of Jonathan Shinn.

All in all, the picture portrayed by the Petitioners'

complaints, various of the Respondents' admissions in their joint Answer to the Petitioners' complaint and the T.E.A.'s report as made an exhibit to Petitioners' Response to [Respondents'] Motion for Summary Judgment, supports Petitioners' claims that parental complaints about a troubled school employee brought his wrath down upon children of the complaining parents, one of whom filed suit.

The lesson of the ***St. Ann.***, *supra,* decision is simple: government may not punish a third party because someone associated with that third party upsets government. In Petitioner' case, their son was increasingly the object of ridicule and humiliation because Petitioners worked within legal parameters to remedy the bad situation created by Wilbanks. The District allowed Wilbanks to punish Petitioners' son throughout the 1992-93 school year with increasing ferocity.

C. The Appellate Court erred by holding that no exercise of protected free speech occurred by minor appellant Jonathan Shinn for which he was punished.

Respondent Wilbanks' behavior was a matter of general, public concern deserving of protection under the First Amendment. The worthy nature of parental concerns about that behavior is evident not only in the fact that the local newspaper focused on the complaints and the agency's investigation of them, but also in the body of the T.E.A.' s official report of its investigation.

The record notes (in the affidavit of Yvonne Shinn, (App. 13-20) that Jonathan Shinn reported Wilbanks' behavior to his mother. Yvonne Shinn, It is a reasonable inference that Wilbanks deduced Jonathan Shinn to have been of

reporter of his, Wilbanks', school behavior, and thus a source of his problems. In fact, those reports by Jon were the flags which drew Wilbanks to the Shinn's parental attention. Whether Wilbanks reacted to those presumed flags and retaliated against Jonathan Shinn is a material fact issue.

D. As Petitioner states a valid constitutional claim, qualified immunity may not attach to individual Respondents Wilbanks, Chancellor, Curry, and Dornburg

Because, as argued above, Petitioners state a valid constitutional claim, Respondents may not fall back on qualified immunity arguments. ***Doe***, Supra, recites that individual supervisors may be held liable for the supervision of employees in a manner which manifests deliberate indifference to the constitutional rights of citizens. The Fifth Circuit held in ***Doe*** at 454 "..that a school official's liability arises only at the point when the student shows that the official, by action or inaction, demonstrated a deliberate indifference to his or her constitutional rights."

The issue then becomes by the objective test for qualified immunity whether "a constitutional right is clearly established if "in the light of pre-existing law the unlawfulness [is] apparent." ***Anderson v. Creighton***, 483 U.S. 635, 640 , 107 S.Ct. 3034, 3039, 97 L.Ed.523, 531 (1987).

Doe, at 454 notes that "[t]he term 'clearly established' does not necessarily refer to 'commanding precedent' that is 'factually on all-fours with the case at bar,' or that hold the 'very action in question' unlawful." In this case, the qualified immunity claims of the asserting Appellees must fail. In the 1992-93 school year, the law was clearly established that school officials who were deliberately indifferent to their

subordinates' violation of a students constitutional rights would themselves be liable.

Wilbanks, likewise, may not claim immunity for his illegal acts under well established tenets of Texas law. ***Director, Etc. v. Printing Industries Ass'n***, 600 S.W.2d 264, 265-6 (Tex. 1980) ***Cobb v. Harrington***, 144 Tex. 360, 190 S.W.2d 709, 712 (1945).

QUESTION PRESENTED NUMBER TWO:

The Fifth Circuit Court of Appeals erred in holding that Petitioner's appeal was frivolous as legal points arguable on the merits exist and justiciable questions were presented to the Court of Appeals.

"A frivolous appeal is one which involves legal points not arguable on the merits." ***Olympia Co., Inc. v. Celotex Corp.***, 771 F.2d 888, 893 (5thCir. 1985). Petitioners' appeal to the Fifth Circuit was based on arguable and valid legal points which were stymied and punished at the District Court and Appellate levels. As argued in the next section,

Petitioners' claim was for the violation of a valid protected constitutionalemotional distress caused by constitutional violations is, as Judge Dennis pointed out in the Appellate opinion, well established. ***Carey v. Phiphus***, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari and in the alternative grant his Petition for Writ of Certiorari, vacate the Fifth Circuit Court of Appeal's decision and remand for further consideration.

Respectfully Submitted,

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APPENDIX

APPENDIX

Shinn v. Collage Station ISD,
96 F.3d 783 (5th Cir.1996).....App.1

Affidavit of Joyce Yvonne Shinn.....App.13

TEA Investigation Report.....App.20

> 96 F.3d 783

112 Ed. Law Rep. 646

Yvonne SHINN, on Behalf of Jonathan Daniel SHINN; John Eugene Shinn, on behalf of Jonathan Daniel Shinn, Plaintiffs-Appellants,
v.
COLLEGE STATION INDEPENDENT SCHOOL DISTRICT; Kenneth Wilbanks; Ray Chancellor; Bob Curry; William Dornburg, Defendants-Appellees.

No. 95-20328.
United States Court of Appeals,
Fifth Circuit.
Oct. 3, 1996.

Parents of high school student, on behalf of student, sued band director, school district, and other school officials alleging that director's "outrageous and unprofessional behavior" resulted in poor year for band and infliction of severe emotional distress on plaintiff student, in violation of student's constitutional rights under the First and Fourteenth Amendments to be free from emotional harassment and be free from punishment absent personal guilt, and that director's behavior violated right to be free from retaliation for exercise of right to free speech. The United States District Court for the Southern District of Texas, John D. Rainey, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, treating order as dismissal for failure to state claim on which relief could be granted, held that: (1) no claim was stated, and (2) appeal was frivolous, so that plaintiffs would be ordered to show cause why reasonable attorney fees and double costs should not be awarded.

Affirmed and order to show cause entered.

Dennis, Circuit Judge, filed opinion specially concurring.

> 1. CONSTITUTIONAL LAW K> 82(12)
92 ---
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
> 92k82(12) Schools, students, and faculty.

[See headnote text below]

> 1. CONSTITUTIONAL LAW K> 278.5(5.1)
92 ---
92XII Due Process of Law
92k278.5 Regulations Affecting Schools and Education
92k278.5(5) Students
> 92k278.5(5.1) In general.

[See headnote text below]

> 1. CONSTITUTIONAL LAW K> 278.5(6)
92 ---
92XII Due Process of Law
92k278.5 Regulations Affecting Schools and Education
92k278.5(5) Students
> 92k278.5(6) Discipline, suspension, or expulsion.

[See headnote text below]

> 1. SCHOOLS K> 63(3)

92 ----
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
> 345k63(3) Powers, duties, and liabilities in general.

[See headnote text below]

> 1. SCHOOLS K> 147
345 ----
345II Public Schools
345II(K) Teachers
345II(K)1 In General
> 345k147 Duties and liabilities.

C.A.5 (Tex.) 1996.

Plaintiff high school student alleging, inter alia, that band director lacked discipline and leadership, insisted that student play only the B-flat clarinet, "verbally abused" another student, yelled at plaintiff student when he tried to turn in his instrument, failed to maintain discipline and "lectured" band students on newspaper article resulting from plaintiffs' complaint to Texas Education Agency, and that unprofessional behavior resulted in poor year for band and infliction of severe emotional distress on many of the students, and that other school officials did not respond adequately to complaints, failed to state a claim on theory that defendants' behavior violated student's constitutional rights under First and Fourteenth Amendments to be free from emotional harassment and to be free from punishment absent personal guilt. U.S.C.A. Const.Amends. 1, 14.

> 2. CONSTITUTIONAL LAW K> 82(1)
92 ----
92V Personal, Civil and Political Rights

92k82 Constitutional Guaranties in General
> 92k82(1) In general.
C.A.5 (Tex.) 1996.
Constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly.

> 3. CONSTITUTIONAL LAW K> 82(6.1)
92 ----
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
> 92k82(6.1) In general.
C.A.5 (Tex.), 1996.
There is no constitutional right to be free from emotional distress.

> 4. CIVIL RIGHTS K> 110.1
78 ----
78I Rights Protected and Discrimination Prohibited
78I(A) In General
78k110 Acts or Conduct Causing Deprivation
> 78k110.1 In general.
C.A.5 (Tex.) 1996.
Right to be free from punishment absent personal guilt is actionable under civil rights statute only when that punishment deprives plaintiff of a constitutionally protected right. > 42 U.S.C.A. § 1983.

> 5. CIVIL RIGHTS K> 235(2)
78 ----
78II Federal Remedies
78II(B) Civil Actions
78II(B)2 Proceedings
78k233 Pleading
78k235 Particular Causes of Action

> 78k235(2) Education.
C.A.5 (Tex.) 1996.

High school student's claim that band director's behavior, including lecturing the band students on newspaper article which mentioned complaint about director by student and his parents to Texas Education Agency, failed to state claim for retaliation for exercising right to free speech, as complaint failed to allege which speech student engaged in and failed to allege facts indicating that band director's actions amounted to retaliation or infringement on student's First Amendment rights. U.S.C.A. Const.Amend. 1.

> 6. CIVIL RIGHTS K> 214(5)
78 ----
78II Federal Remedies
78II(B) Civil Actions
78II(B)1 In General
78k211 Privilege or Immunity; Good Faith and Probable Cause
78k214 Governmental Agencies
> 78k214(5) Schools.
C.A.5 (Tex.) 1996.

Absent violation of clearly established constitutional right of student by school officials, including allegedly inadequate band director and other officials who allegedly failed to respond adequately to complaints about director, such officials in their individual capacities were entitled to qualified immunity in civil rights suit. > 42 U.S.C.A. § 1983.

> 7. CIVIL RIGHTS K> 206(3)
78 ----
78II Federal Remedies
78II(B) Civil Actions
78II(B)1 In General
78k204 Persons Liable

78k206 Municipalities and Other Governmental Bodies

78k206(2) Acts of Officers and Employers; Respondeat Superior

> 78k206(3) Governmental ordinance, policy, practice, or custom.

C.A.5 (Tex.) 1996.

There could be no liability of school district or of school officials in their official capacities under civil rights statute, even if there was a violation of student's constitutional right, absent allegation that defendants acted pursuant to official custom or policy of the district or that district implemented such an official custom or policy. > 42 U.S.C.A. § 1983.

> 8. FEDERAL CIVIL PROCEDURE K> 2840

170A ----

170AXX Sanctions

170AXX(F) On Appeal

170Ak2837 Grounds

> 170Ak2840 Frivolousness; particular cases.

C.A.5 (Tex.) 1996.

Appeal of dismissal of complaint alleging that unprofessional behavior of band director resulted in poor year for band and infliction of severe emotional distress on plaintiff student, in violation of First and Fourteenth Amendment rights, was frivolous for purposes of rule providing for imposition of reasonable attorney fees and double costs. U.S.C.A. Const.Amends. 1, 14; F.R.A.P. Rule 38, 28 U.S.C.A.

Laurence W. Watts, Carleton Christopher Casteel, Watts & Associates, Houston, TX, for Plaintiffs-Appellants.

Tom M. Davis, Jr., Juliann Hale Panagos, Mary Lucille Anderson, Davis & Shank, Houston, TX, for Defendants-Appellees.

Wayne Thomas Rife, West, Adams, Webb and Allbritton, Bryan, TX, for Kenneth Wilbanks, Ray Chancellor, Bob Curry, William Dornburg.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, EMILIO M. GARZA and DENNIS, Circuit Judges.

PER CURIAM:

Yvonne and John Eugene Shinn, on behalf of Jonathan Daniel Shinn, appeal the district court's order granting College Station Independent School District ("School District"), Kenneth Wilbanks, Ray Chancellor, Bob Curry, and William Dornburg summary judgment on the Shinns' claims. Finding no reversible error, we affirm and order the Plaintiffs to show cause why reasonable attorney's fees and double costs should not be awarded to the Defendants as damages, pursuant to FED.R.APP.P. 38.

The Plaintiffs brought suit on behalf of their son, Jonathan, alleging that the Defendants violated Jonathan's rights under the United States Constitution and the Constitution of Texas. The Plaintiffs alleged that while Jonathan was a freshman member of the A & M Consolidated High School ("A & M") Band, his constitutional rights were violated by the actions of the band director, Defendant Kenneth Wilbanks. The Plaintiffs' amended complaint further alleged that the school officials inadequately responded to their complaints. The complaint, in essence, alleged extreme dissatisfaction with

Wilbanks's performance as band director. Representative allegations included that Wilbanks: lacked discipline and leadership; "insisted that Jon only play the B-flat clarinet"; showed disrespect to the assistant band director; failed to distribute the band rules until "six entire weeks" after the start of practice; gave the band members the day off when he learned that they were planning a "walk-off" during practice to protest his performance as a band director; walked into the girls' locker room; failed to provide parents with "information" about the marching band competition in Killeen, Texas, which resulted in the Plaintiffs arriving at the competition four hours and fifteen minutes early; spoke "over the band's half-time performance bestowing praises on the coaches"; "verbally abused" another student, and Jonathan then witnessed the student's "horrified look when she stepped out of Wilbanks' office"; failed to handle the band instruments properly; "yelled at" Jonathan when he tried to turn in his instrument; "failed to maintain discipline over some band members and allowed the members to stay up to at least 3:00 a.m."

When Jonathan told his parents about Wilbanks's behavior, the Plaintiffs complained to the school officials. The Plaintiffs allege that the school officials did not respond adequately to their complaints. Consequently, the Plaintiffs asked the Texas Education Agency ("TEA") to investigate Wilbanks's behavior. The TEA's investigation did not sustain the Plaintiffs' allegations. Finally, when the local newspaper ran an article about Wilbanks which mentioned the Plaintiffs' complaint and the investigation by the TEA, Wilbanks "lectured" the band students on the article. The Plaintiffs allege that during the lecture, Wilbanks "directed his comments" at Jonathan and another student, whose parents had also been instrumental in bringing the TEA investigation. All in all, the Plaintiffs complain that "Wilbanks' outrageous and unprofessional behavior resulted in a poor year for the band and

the infliction of severe emotional distress upon many of the students, including Jon Shinn."

The Plaintiffs filed suit against the School District and various school officials in their individual and official capacities, pursuant to > 42 U.S.C. § 1983. The Plaintiffs allege that the Defendants' behavior violated Jonathan's constitutional rights under the First and Fourteenth Amendments to be free from emotional harassment and to be free from punishment absent personal guilt, and that Wilbanks's behavior violated Jonathan's right to be free from retaliation for exercising his right to free speech. > (FN1) The district court granted the Defendants' motion for summary judgment. However, a close reading of the district court's order reveals that the court dismissed the Plaintiffs' complaint for failure to state a claim upon which relief could be granted. Therefore, we will review the dismissal de novo as one under FED.R.CIV.P. 12(b)(6). > Rutherford v. United States, 702 F.2d 580, 581 n. 1 (5th Cir.1983).

> [1] > [2] > [3] > [4] > [5] > [6] > [7] We provide the detailed description of the Plaintiffs' allegations in order to illustrate that a constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly. There is no constitutional right to be free from emotional distress. See > Grandstaff v. City of Borger, Tex., 767 F.2d 161, 172 (5th Cir.1985) ("Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." (quoting > Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695-96, 61 L.Ed.2d 433 (1979))), cert. denied, > 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987). The right to be free from punishment absent personal guilt is only actionable when that punishment deprives the plaintiff of a constitutionally protected right. > Burris v. Willis Indep. Sch. Dist., Inc., 713 F.2d 1087, 1093 n. 3 (5th Cir.1983). The Plaintiffs have made no such

allegation. Finally, the Plaintiffs' free speech claim fails because they have not alleged what speech Jonathan engaged in, nor have they alleged facts indicating that Wilbanks's actions amounted to retaliation or infringement on Jonathan's first amendment rights. See > Haverkamp v. Unified Sch. Dist. No. 380, 689 F.Supp. 1055, 1058-59 (D.Kan.1986) (dismissing plaintiff's first amendment claim where the complaint did not indicate retaliation by school officials or a restriction of plaintiff's first amendment rights); see also > Wilson v. UT Health Ctr., 973 F.2d 1263, 1270 (5th Cir.1992) (upholding directed verdict on first amendment claim because plaintiff produced insufficient evidence that certain defendants "retaliated against her for her speech"), cert. denied, > 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993). > (FN2)

> [8] For the foregoing reasons, we AFFIRM the judgment of the district court. Moreover, we conclude that the Plaintiffs' appeal is frivolous. See > Olympia Co., Inc. v. Celotex Corp., 771 F.2d 888, 893 (5th Cir.1985) (stating that a "frivolous appeal is one which involves legal points not arguable on the merits") (citation omitted), cert. denied, > 493 U.S. 818, 110 S.Ct. 73, 107 L.Ed.2d 39 (1989). We therefore ORDER the Plaintiffs to show cause why reasonable attorney's fees and double costs should not be awarded to the Defendants as damages, pursuant to FED.R.APP.P. 38.

DENNIS, Circuit Judge, specially concurring:

I concur in the result of the majority's decision, i.e., that the plaintiff's action does not reach the threshold of a claim based on a constitutional violation. My only objection to the majority's opinion is that it disposes of the plaintiffs' substantive due process claim by constructing a vagary that has no real basis in law. The majority states:

There is no constitutional right to be free from emotional distress. See > Grandstaff v. City of Borger, Tex., 767 F.2d 161, 172 (5th Cir.1985).

If all the majority means is that a person cannot recover for emotional distress under § 1983 unless that distress stems from a constitutional violation, the statement is merely misleading due to lack of precision and coherence. Further, the statement does not explain why there was no constitutional violation in this case. On the other hand, I seriously doubt that the majority intends to imply that a person can never recover damages for emotional distress under § 1983 or cannot recover for such distress in the absence of physical or significant injury. The law is too well settled to the contrary. > Memphis Community School Dist. v. Stachura, 477 U.S. 299, 306, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986) (mental and emotional distress constitute compensable injury in § 1983 cases); > Carey v. Piphus, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978) (same); > Harper v. Harris County, Tex., 21 F.3d 597 (5th Cir.1994) (a plaintiff is no longer required to prove significant injury to assert a § 1983 Fourth Amendment excessive force claim); see > Dunn v. Denk, 79 F.3d 401 (5th Cir.1996) (this court's holding in > Johnson v. Morel, 876 F.2d 477 (5th Cir.1989) (en banc), which grafted onto the Fourth Amendment objective reasonableness standard of > Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) the additional requirement of a significant injury, has been effectively overruled by > Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)).

Moreover, as I read > Grandstaff v. City of Borger, Tex., 767 F.2d 161 (5th Cir.1985) it cannot properly be made to stand for a broad rule that there is no constitutional right to be free from emotional distress. It simply holds that bystanders may not recover under § 1983 for officers' negligent infliction

of emotional distress by shooting and killing their husband and stepfather within their sight. The > Grandstaff opinion, > 767 F.2d at 172. stated:

Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." > Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695-96, 61 L.Ed.2d 433 (1979).

> FN1. We note that the attorney that brought this appeal did not appear at oral argument. Instead, he sent a colleague who conceded at oral argument that the Plaintiffs' claims under the Texas Constitution were without merit; therefore, we need not address these claims on appeal.

> FN2. Additionally, because the Plaintiffs have failed to establish the violation of a clearly established constitutional right, the Defendants in their individual capacities are entitled to qualified immunity. See > Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir.) (stating standard for qualified immunity), cert. denied, > — U.S. —, 116 S.Ct. 532, 133 L.Ed.2d 438 (1995). Furthermore, even if we were to find the violation of a constitutional right, the Plaintiffs have not alleged that the Defendants acted pursuant to an official custom or policy of the School District, or that the School District implemented such an official custom or policy; therefore, there cannot be § 1983 liability for the School District or for the Defendants in their official capacities. > Meadowbriar Home For Children, Inc. v. Gunn, 81 F.3d 521, 533 (5th Cir.1996).

AFFIDAVIT OF JOYCE YVONNE SHINN

BEFORE ME, the undersigned authority, on this day personally appeared **JOYCE YVONNE SHINN**, and being by me duly sworn on his oath, deposed and said:

"My name is Joyce Yvonne Shinn. I am over the age of eighteen (18), have personal knowledge of the facts stated herein and am competent to make this affidavit.

"My husband's name is John Eugene Shinn. My son's name is Jonathan Daniel Shinn; we call him "Jon" for short. Jonathan entered the A & M Consolidated High School's band program as a freshman during the 1992/93 school year. His band director was Mr. Kenneth Wilbanks. I personally witnessed the negative effect Mr. Wilbanks' conduct had on our son. I personally can attest that Jon's emotional distress increased during the approximately ten months that he was under Mr. Wilbanks' super-vision.

"Our first indication that Mr. Wilbanks was not providing a positive role model for our son came when Jon reported that Mr. Wilbanks was allowing the older students to actively haze or harass our son and other band students. Though we had agreed with Mr. McSpadden, the assistant band director, that Jon, who is musically talented, should experiment with a number of different instruments; Mr. Wilbanks would only allow him to play the B-flat clarinet.

"When Jon informed us that it was Mr. Wilbanks'

standard practice to yell at the band students during practice, I spoke to Dr. Cunningham, who was an administrator and curriculum coordinator, and asked that he exercise some control over Wilbanks' propensity to yell at students. Jon told us that he was particularly a target of Wilbanks' yelling. Also Jon told us that Mr. Wilbanks often showed Mr. McSpadden disrespect. Dr. Cunningham, who had a child in the band, stated that he would discuss the problem with appropriate College Station I.S.D. administrators. However, based on the fact that Jon continued to relate that Mr. Wilbanks resorted to yelling at students, there was no positive result from our discussion with Dr. Cunningham.

"As Fall of 1992 progressed, and I began to hear more about Mr. Wilbanks conduct, I determined to find out more about Mr. Wilbanks' background. I learned that Mr. Wilbanks was supposedly hired by a site based management committee. In order to learn who sat on that committee, I attempted to gain access to the information, first from Mr. Bob Curry, later from Mr. Domburg or his secretary, an administrator in charge of personnel. Mr. Curry told me that he could not give me that material Mr. Domburg's approval. Apparently both men were out of town. When they returned, I made my request again to Mr. Domburg. He, too, like Curry, acted as if he had no idea what I was referring to when I used the phrase "site-based management". Everyone of them acted as if they had no idea of what I was talking about. I made repeated requests for the information, but Mr. Domburg was uncooperative. Finally I resorted to using the Texas Open Records Act, and he complied with my request. I later learned that Mr. Domburg

was very familiar with site-based management principles, for during the time he was acting ignorant about the process, he and Dr. Chancellor had been at a conference in Austin about site based management.

"I was told by Mr. Larson, an assistant band director, that he and other band directors had met with Defendant Domburg about Mr. Wilbanks' conduct. Mr. Larson told me that Dr. Chancellor had threatened the band directors and other music faculty with their jobs if they continued to complain. Mr. McSpadden told me that he was told to keep quiet and not discuss his concerns about Mr. Wilbanks.

"Bonita Warnell spoke with a Mr. Virgil Tiemann, Superintendent of Schools for the West Columbia I.S.D. Mr. Tiemann told Bonita Warnell, who told me, that he (Mr. Tiemann) had spoken to Defendant Ray Chancellor before Wilbanks was hired. Mr. Tiemann told Dr. Chancellor about the problems he had with Mr. Wilbanks. Those problems included that Mr. Wilbanks had a very bad-rapport with band students and administrators.

"I personally contacted two band parents, Ms. Fabrygel and Ms. Connie Ward, who confirmed that Mr. Wilbanks had been a very bad band director and role model while he was at West Columbia I.S.D. I also spoke to Mrs. Walford, the choral director, who told me that Wilbanks had become so verbally abusive toward her that he was prohibited from coming near her.

"Jon told me that he had personally observed Mr.

Wilbanks on several occasions walked into the girl's dressing room in the band hall.

"During the month of October, I and other parents tried to set up an appointment with Dr. Chancellor to discuss our concerns. We had discussed our concerns with Assistant Principal Chrissy Hester, who told us that she had collected a large number of complaints from concerned parents complaining about Mr. Wilbanks. She expressed her concern that Mr. Wilbanks should not be directing a band program.

"I also spoke to Mr. Bob Curry, the high school principal, who called me at work one day. During our conversation, Mr. Curry attempted to suggest that the problems with Mr. Wilbanks were centered solely on Jon. However I repeatedly told him that I was concerned not only for Jon's well-being but also for the other band students. Mr. Curry also suggested that the entire problem would go away if Jon was allowed to play more than one instrument. I again told him that our concerns were focused not on what we could get for Jon, but rather on how the administration was going to deal with Mr. Wilbanks. Mr. Curry never told me how he or the other administrators were going to address the problems that Mr. Wilbanks presented.

"On November 10, 1992, I and other concerned parents attended a meeting set up by the administration. During this meeting the only people allowed to speak were those people who supported Wilbanks. It became readily apparent that this staged band booster meeting was designed not to

allow parents to voice their concerns. Rather several people were called to give short, positive speeches about Mr. Wilbanks.

"We received a letter supposedly written by Mr. Wilbanks; it bore his signature and Mr. McSpaddens'. The letter came in response to one I had sent to Mr. Curry asking him to address my concerns about Wilbanks' conduct. I was surprised to see Mr. McSpadden's signature since I knew he did not hold Mr. Wilbanks in high regard and was concerned about his conduct as well. Later, on November 27, 1992, Mr. McSpadden told me that Mr. Curry and Mr. Wilbanks had forced him to sign the letter. He had flatly refused to sign the first two letters, but was finally coerced into signing the third.

"Jon reported to me that he had roomed with three other boys during a January, 1993 out-of-town band trip. His room had been next door to one occupied by older male band members. After curfew was called that evening, Mr. Wilbanks went to the room where the older band members were staying. Mr. Wilbanks and the boys stayed up until 3:00 a.m. Throughout the morning they discussed other students by name and laughed about things that were said about these students.

"After the students returned from the January, 1993 band trip, many parents called the school administrators and complained about Mr. Wilbanks' conduct.

"I received the document attached as Exhibit A to Plaintiffs' Response to Defendants' Motion for

Summary Judgment. This was sent to me by Mr. Walter Rambo, an investigator from the Texas Education Agency. I know that Mr. Rambo did not conduct a complete investigation into the allegation that Mr. Wilbanks walked into the girls dressing room in the bandhall. Only two girls were interviewed, and they both had a neutral opinion about Mr. Wilbanks' conduct. The six to eight girls who were concerned about Mr. Wilbanks' conduct were never interviewed. Also I know that other high school teachers and administrators did not testify because they were intimidated by Dr. Chancellor, who required anyone who testified to sign a log in his office before that person went into testify.

"After the Texas Education Agency report was distributed, the local newspaper, the Bryan-College Station Eagle ran a story about the report. My name was mentioned. Mr. Wilbanks made a point of lecturing the band and directing his comments at Jon Shinn. Throughout the speech he scowled at my son. After the speech was over, my son went to Assistant Principal Chrissy Hester's office, who in turn called me and related Jon's distress at Mr. Wilbanks conduct.

"I know that the school board reassigned Mr. Wilbanks to the central administrative offices on March 29, 1993. The board then returned Mr. Wilbanks to being a band director on April 20, 1993. He remained in that capacity until the end of the year.

"On May 13, 1993 1 was told that in August, 1992, Mr. Wilbanks had put trophies and instruments into

the trash dumpster behind the high school. This action took place during summer band practice. Chrissy Hester told me that she had received telephone calls from parents whose children discovered the instruments.

"Jon told me that on May 17, 1993 when he tried to turn his band instrument into Mr. McSpadden that Mr. Wilbanks tried to physically block access to Mr. McSpadden. When Jon found an alternative route, Mr. Wilbanks resorted to verbal abuse while Jon walked past Mr. Wilbanks.

"Chrissy Hester was the school administrator who voiced the most concern and attempted to deal with the problems Mr. Wilbanks presented. She has in her possession a vast record of the complaints leveled against Mr. Wilbanks. Those records include every telephone complaint she received about Mr. Wilbanks. Also she kept records of every telephone call and meeting she had with other administrators about Mr. Wilbanks. She also had every complaint registered by students.

"I have read the foregoing Affidavit and attest that every statement contained herein is within my personal knowledge and true and correct.

"Further, Afflant sayeth not."

REPORT

INVESTIGATION OF A COMPLAINT

AGAINST

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT

March 2, 1993

BACKGROUND INFORMATION AND PROCEDURES:

On February 17-18, 1993, a team composed of staff members from the Complaints Unit of Texas Education Agency conducted an investigative visit to the College Station Independent School District (CSISD). The team consisted of Mr. Walter Rambo, Director of the Complaints Unit and Sandy Lowe, Staff Attorney in the Complaints Unit. The focus of the visit was a complaint by Ms. Yvonne Shinn and other parents of students who are/were members of the A & M Consolidated High School Band. The complaint stated that:

(1) High school band director, Mr. Kenneth Willbanks had sexually harassed female students by entering the girls dressing room on several occasions while some female students were not fully dressed.

(2) High school principal, Mr. Bob Curry and band director, Mr. Kenneth Willban ks had forced high school assistant band director, Mr. John

McSpadden to sign a document with which he strongly disagreed, and which contained false information.

(3) High school principal, Mr. Bob Curry told Mr. John McSpadden, high school assistant band director, that he did not have the right to say anything negative about the high school band program or the high school band director, Mr. Kenneth Willbanks.

(4) District Superintendent, Dr. Ray L. Chancellor, threatened all secondary music faculty with the loss of their positions in the district when they expressed concerns about the high school band director, Mr. Kenneth Willbanks.

During the visit, interviews were conducted with district personnel, the complainants, band students, and the President of the district's board of trustees. In addition, district documents relating to the complaint were examined.

The following lists identify information sources consulted while conducting the College Station ISD investigation:

Interviewees:

Mr. Daniel MacGilvray, President, Board of Trustees, CSISD
Dr. Ray L. Chancellor, Superintendent, CSISD
Mr. Kenneth Willbanks, High School Band Director, CSISD

Mr. Billy Dornburg, Personnel Director, CSISD
Mr. Bob Curry, Principal, A & M Consolidated High School
Ms. Chrissy Hester, High School Assistant Principal
The Complainants, Ms. Yvonne Shinn and approximately 30
other parents of students, and students, who are/were members of the high school band.
Mr. James Larson, Junior High Band Director
Ms. Michelle Perez, Junior High Assistant Band Director
Mr. John McSpadden, High School Assistant Band Director
Mr. Ron White, High School Orchestra Director
Ms. Peggy Moritz, Junior High Choir Director

Documents:

Letters from parents to board of trustees
Memoranda between Mr. Willbanks and school administrators
CSISD internal investigation of the complaint
High School Head Band Director job posting
Coordinator of Instrumental and Choral Music (Grades 5-12) job posting

FINDINGS:

According to Dr. Ray L. Chancellor, District Superintendent, College Station Independent School District advertised for applicants for the position of High School Head Band director on April 1, 1992. Mr. Kenneth Willbanks was hired by the College Station Independent School District in the summer of

1992, for the advertised position. No one who was currently employed by the district applied for the advertised position. Mr. Willbanks began working in this position in July, 1992. Mr. Willbanks was not introduced., by the administration, to the remainder of the secondary music faculty. Mr. Willbanks initial teaching duties began August 1, 1992, with the beginning of summer band. Mr. Willbanks had been told, in his interviews, by Mr. Billy Dornburg, Personnel Director, CSISD that the position would entail more duties than just high school band director, he would be Secondary Music Coordinator. Mr. Willbanks interpreted the information from Mr. Dornburg to indicate that he had supervisory capacity over the rest of the secondary music faculty, and began to communicate with the music faculty as though he were their supervisor. Dr. Chancellor and Mr. Dornburg both indicated that it was never the intention of the district that Mr. Willbanks be supervisor over secondary music personnel, his expanded duties were to include coordination of the secondary music program, budgeting, contests and scheduling. Dr. Chancellor told the investigation team that he made the decision to reassign the job title of Coordinator of Instrumental and Choral, music (Grades 5-12) to Mr. Willbanks, along with the change in job title were additional duties, however no additional pay was added to the position. In October, 1992, a job advertisement for the position of Coordinator of Instrumental and Choral Music (Grades 5-12) was posted. The rest of the music faculty found out through memos from Mr. Willbanks of his new title and assumed responsibilities. In a memo from Dr. Chancellor on September 3, 1992, he indicated that something was wrong with the band program. In a meeting in September 1992, Dr. Chancellor met with the three secondary principals and all secondary music personnel to discuss the problematic situation. According to Dr. Chancellor, he advised the faculty during the meeting that "if they did not like their jobs in the district they had nine months

to be looking' for another district in which to work." In a follow-up memo, dated September 23, 1992, addressed to the secondary music faculty, secondary principals, and Mr. John Rouse, Dr. Chancellor stated that he wanted the music program to be organized into a single department at the secondary level and coordinated as a single academic unit. The memo stated that Dr. Chancellor has assigned Mr. Willbanks to coordinate efforts to establish a department of music. Attached to the memo was the job description for Coordinator of Instrumental and choral Music (Grades 5-12), which would be Mr. Willbanks position.

All music personnel interviewed, except Mr. John McSpadden, high school assistant band director, stated to the investigation team that if Mr. Willbanks returned to the district next year they would not return to work for the district.

Board of Trustees President, Mr. Dan MacGilvray, indicated that the situation was badly handled by the district administration. Both high school principal, Mr. Bob Curry and Dr. Chancellor refused to meet with the parent group. Mr. MacGilvray stated that he felt that if a meeting with parents had been held when the complaints began-the situation would not have escalated to the present level. Mr. MacGilvray also told the team that the board had directed Dr. Chancellor to perform an internal investigation the band situation to be presented to the board at the February meeting. This report was not delivered to the board, as directed, by Dr. Chancellor at the February meeting. Mr. MacGilvray also stated concern that after hearing our statement that we had contacted Dr. Chancellor on Monday, February 15, 1993, to inform him of our visit on February 17, that Dr. Chancellor did not inform the board that evening at the board meeting, of the visit, which would occur in two days.

Complaints by band students and their parents to high school administrators began in August, 1992, during summer band. During., September students began to schedule appointments with high school assistant principal, Ms. Chrissy Hester to discuss the band problems. Letters from parents addressing problems with Mr. Willbanks and the band were sent to the administration and to the board of trustees beginning in early October, 1992. Parents who wrote the board were advised to follow their complaints through the local complaint procedures. After parent concerns were not addressed satisfactorily by the district administration, the parents addressed the board of trustees regarding their concerns on November 16, 1992, and presented the board with a resolution and list of complaints about the band program and Mr. Willbanks. At this point, Board president, Mr. MacGilvray, wrote TEA requesting an investigation. our response, through Dr. Charles Benson, was that the agency had no jurisdiction over the matter And that the district should solve the problem through investigation and resolution at the local level. The board, in a letter dated December 17, 1992, then instructed Dr. Chancellor to commence an internal investigation to be presented to the board at its February meeting.

Ms. Chrissy Hester, high school assistant principal was interviewed at the request of Mr. MacGilvray, board president, who felt that Ms. Hester had the best overall understanding of the situation, and also that Ms. Hester was an individual of especially good perception and judgment. Ms. Hester voiced several concerns relating to Mr. Willbanks as a teacher and also concerns relating to the situation in which Mr. Willbanks was hired by the district. Ms. Hester felt that it was crucial to the dispute situation that the position was advertised as head high school band director, yet when he was hired, Mr. Willbanks was assigned the job position of music coordinator. Additionally concern was voiced over the fact that no one in

the district was informed that the position would be for music coordinator, and feels that if that particular position had been advertised someone already employed by the district would have applied for the position. Ms. Hester also stated that the administration did not communicate to the music faculty Mr. Willbank's new job title and his additional responsibilities.

Ms. Hester also had concerns relating to Mr. Willbank's teaching situation. She noted that Mr. Willbank's lack of good judgment and his manipulation of students had resulted in some students dropping out of the band who needed to be in band to keep from dropping out of school, and also the situation in which students who have never had any problems at school, in any manner, becoming so upset with the band situation and Mr. Willbanks that they are becoming defiant in their actions. She noted that the band enrollment had dropped from approximately 110 in August to a current enrollment of 80.

After much discussion of the situation, Ms. Hester stated that she felt that the situation could be solved with Mr. Willbanks not being recommended for a contract for next school year, and also felt that tensions could be eased at the high school if Mr. Willbanks was re-assigned to another position within the district for the remainder of the school year. When questioned regarding the ability of Mr. McSpadden to handle the high school band program alone, Ms. Hester had no reservations about Mr. McSpadden's ability to run the program on his own, and stated that she felt that with the current problems in the band program, the situation would operate much more smoothly for the remainder of the school year under the direction of Mr. McSpadden.

The documentation from the districts internal investigation was examined, and two members of the first level review

committee, Bob Curry, High School Principal and Gerald Wynn, Oakwood Principal were interviewed. The responsibility for the investigation was assigned to Dr. Chancellor by the board of trustees on January 14, 1993. Dr. Chancellor was directed to present the results of the investigation to the board on February 10, 1993. The report was not presented to the board, as directed, at the February 10, 1993 board meeting because, according to Dr. Chancellor, it was not complete.

The report of the first tier review committee stated that:

The band program, grades 6-12, at this time is not a viable program. The personality, philosophical, and other conflicts between Mr. Willbanks, Mr. Larson, Mr. McSpadden, and Ms. Perez are not mendable.

The documentation indicates that this review committee made the following recommendations:

1. Personnel changes need to be made in the band program.

2. Complaints submitted to the board, which have not followed local policy, GF, be referred to the appropriate level for review.

3. Band personnel recommendations be made at the March board meeting.

The committee suggestions for future considerations included, but were not limited to:

1. Job descriptions for the positions of band director and music coordinator be clearly

defined prior to posting.

2. Coordinator of music position be reopened and selection made from applications submitted.

In his interview, Mr. Gerald Wynn, Oakwood Principal, stated that he had spent 60 plus hours interviewing students, parents, and district personnel. Regarding the allegation of sexual harassment, Mr. Wynn noted that during the interviews he talked with every girl who was present in the room which Mr. Willbanks entered while the girls were allegedly dressing, and that not one student complained of sexual harassment.

As possible solutions to the problems among the music faculty, Mr. Wynn stated that he feels that a start is to not recommend Mr. Willbanks for a contract next year. In order to prevent the same type situation from recurring Mr. Wynn suggested that some of the music faculty need to be placed on growth plans, that there should be an opportunity for in-house personnel to apply for the position of music coordinator, and that the district needs to set some definite goals for the music department as a whole so that the programs can be coordinated.

Bob Curry, high school principal, and a member of the district's internal investigation first tier review committee stated in his interview that the dressing room incident was investigated first by Ms. Hester, and later by the first tier committee. No violation of policy was found by either investigation, and no charge of sexual harassment was sustained. Mr. Willbanks was directed to establish, in writing, rules for the female band, students to follow regarding dressing rooms.

As to the allegation that Mr. McSpadden was forced to sign a statement with which he disa[illegible]r. Curry stated that at no time had Mr. McSpadden expre[illegible] him that he had any

disagreement with any information, letter, or memo which he signed.

Mr. Curry stated that Mr. Willbanks had not violated any policy, nor had he done anything which necessitated that he be fired during the term of his contract. However, Mr. Curry said that Mr. Willbanks does not have a viable band a viable band program. He stated that it would be best for Mr. Willbanks to resign prior to the March board meeting. When questioned as to the remainder of this school year, Mr. Curry did not offer any solution, but stated that "Mr. Willbanks will be in the position for the remainder of this year, and the students and their parents will have to deal with it."

Mr. John McSpadden, high school assistant band director, was interview by the team regarding the allegation that he had been forced by Mr. Curry to sign a Statement with which he disagreed. Mr. McSpadden's response to the question was that he doesn't recall any particular letter with which he disagreed, and that if he balked at signing something, it was probably due to the fact that he didn't write the letter, and therefore felt uncomfortable signing something which he did not write.

Mr. McSpadden stated that he felt that the band program is currently at an all time low, and that twelve to fourteen seniors have dropped out of the band as a result of the conflicts. He noted that he feels that part of the reason for this is the way in which Mr. Willbanks was hired and also the method in which Mr. Willbanks communicated or failed to communicate with band students, and their parents. According to Mr. McSpadden, Mr. Willbanks failed to get necessary information out to the-parents, he did not set ground rules for the students, he obviously plays "favorites" among the students, and he takes every question from students as a personal affront, and tends to act "like a child" when dealing with students on controversial

issues. Mr. McSpadden also added that he and Mr. Willbanks did not have any problems working together as may have been alleged by other members of the music faculty.

CONCLUSIONS:

The Texas Education Agency is required to investigate, review, and act on substantive complaints concerning state law and State Board of Education rules and regulations governing the education of children in this state. However, this Agency has no authority to make recommendations regarding personnel actions in a school district. Therefore the investigative report will not address any personnel issues. The board of trustees of a district is the entity solely responsible for hiring and firing of district personnel.

The specific allegations and the position of the Agency are as follows:

Allegation:

High school band director, Mr. Kenneth Willbanks sexually harassed female students by entering the girls' dressing room on several occasions while some of the female students were not fully dressed.

Conclusion:

The investigation revealed that while there was some misunderstanding on the part of the female students involved as to the proper facility to use while changing clothes, nothing in the documentation examined, nor in the interviews with the investigative

team, indicated that Mr. Willbanks actions represented sexual harassment towards the female students. The allegation cannot be sustained.

Allegation:

High school principal, Mr. Bob Curry and band director, Mr. Kenneth Willbanks forced high school assistant band director, Mr. John McSpadden to sign a document with which he strongly disagreed, and which contained false information.

Conclusion:

The investigation revealed that Mr. McSpadden felt no pressure by Mr. Curry or Mr. Willbanks to sign any document with which he strongly disagreed. The allegation cannot be sustained.

Allegation:

High school principal, Mr. Bob Curry told Mr. John McSpadden, high school assistant band director, that he did not have the right to say anything negative about the high school band program, or the high school band director, Mr. Kenneth Willbanks.

Conclusion:

According to Mr. McSpadden's interview, Mr. Curry consulted with him regarding the importance of the band directors being able to work together, and instructed Mr. McSpadden that if anyone questioned him about Mr.

Willbanks to refer that individual to Mr. Curry. As principal, Mr. Curry is responsible for the-personnel situation on his campus, and therefore the instructions to Mr. McSpadden were proper according to board policy. The allegation cannot be sustained.

Allegation:

District Superintendent, Dr. Ray L. Chancellor, threatened all secondary music faculty with the loss of their employment positions in the district when they expressed concerns about the high school band director, Mr. Kenneth Willbanks.

Conclusion:

According to Dr. Chancellor, at a meeting held in September, 1992, to discuss problems with Mr. Willbanks, he informed the members of the secondary music faculty that "if they didn't like their jobs in the district they had nine months to find another district in which to work". All music faculty members interviewed affirmed the comment by Dr. Chancellor. Dr. Chancellor's actual comment, while perhaps construed by some of the individuals as threatening their jobs, cannot be viewed by the investigators as an actual threat. In addition, Dr. Chancellor followed the meeting with a memo in which he addressed his sensitivity to the music faculty's concerns. As Superintendent, Dr. Chancellor explained to the music faculty that there is an established district policy for processing of grievances, and the actions of some of the music faculty members of going outside the policy had created some of the problems associated with the

band program. The allegation cannot be sustained.

Supreme Court, U.S.
FILED
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No. 97-1450

In The

Supreme Court of the United States

October Term, 1996

JOYCE YVONNE SHINN,
on behalf of Jonathan Daniel Shinn,

and

JOHN EUGENE SHINN,
on behalf of Jonathan Daniel Shinn,

Petitioners,

vs.

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT, KENNETH WILBANKS, RAY CHANCELLOR, BOB CURRY and WILLIAM DORNBURG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER ONE:

Whether the Fifth Circuit Court of Appeals erred in holding that Petitioners failed to state a proper claim or defense under 42 U.S.C. § 1983 regarding:

A. Jonathan Shinn's liberty interest in being free from emotional harassment;

B. Jonathan Shinn's liberty interest in being free from punishment absent personal guilt;

C. Jonathan Shinn's exercise of protected speech; and

D. Respondents' entitlement to qualified immunity.

QUESTION NUMBER TWO:

Whether the Fifth Circuit Court of Appeals erred in holding that Petitioners' appeal was frivolous.

LIST OF INTERESTED PARTIES

The Petitioners in this case are Joyce Yvonne Shinn and John Eugene Shinn, on behalf of Jonathan Daniel Shinn. Petitioners' counsel of record is Laurence W. Watts. Upon information and belief, Wayne T. Rife of West, Webb, Allbritton & Gentry is also counsel for Petitioners.

Respondents are correctly identified in the caption. Tom M. Davis, Jr. of Davis & Shank, P.C. is counsel of record for all respondents. Juliann H. Panagos and M. Lucille Anderson are also counsel for respondents. Each of the respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the Petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit. The court of appeals' opinion is reported at 96 F.3d 783 (5th Cir. 1996), *petition for writ of cert. filed,* 65 U.S.L.W. 37 (U.S. April 1, 1997) (No. 96-1450). (For the Court's convenience, all citations to the October 3, 1996 opinion will be to the copy attached at Appendix 1-12 of the petition).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioners appealed to the Court of Appeals for the Fifth Circuit after Respondents' Motion for Summary Judgment was granted in the United States District Court for the Southern District of Texas. By its October 3, 1996 *Memorandum to Counsel,* the court of appeals affirmed the district court's decision that Petitioners failed to state a claim upon which relief could be granted. (Pet. App. 10). The court of appeals also concluded that Petitioners' appeal was frivolous and ordered that reasonable attorney's fees and double costs be awarded to Respondents as damages, pursuant to FED. R. APP. P. 38. (App. 1a). Petitioners appeal from the decision of the court of appeals.

B. Correction of Misstatements in the Petition.

The October 4, 1996 opinion of the court of appeals correctly sets forth the facts of this case. The opinion accurately reflects the concerns Petitioners had with the high school band director's conduct during the 1992-93 academic year and the actions taken by Petitioners as a result of their concerns. In the interest of brevity, Respondents respectfully direct the Court's attention to the appellate court's opinion. (Pet. App. 1-12).

Pursuant to United States Supreme Court Rule 15.1, Respondents bring to the Court's attention the following misstatements of fact contained in the petition.

Petitioners mischaracterize the incidents surrounding Wilbanks' prior employment as a "very controversial and troubled work history" on page 4 of the petition. In actuality, Petitioners' first amended complaint in this case refers only to information allegedly obtained from Superintendent Chancellor regarding two of band director Wilbanks' prior places of employment. First, Petitioners allege in their complaint that Wilbanks had questionable band instrument inventory problems at the end of the school year, a bad rapport with students and administrators, and verbally abused the choir director. Second, at Thomas Jefferson High School, Petitioners allege that Wilbanks had the same questionable band instrument inventory problem. Petitioners' subjective speculation about Wilbanks' undescribed behavior at West Columbia High School and at Thomas Jefferson High School, without more, does not amount to a "very controversial and troubled work history" as characterized by Petitioners on page 4 of the petition.

Further, Petitioners provide no record references for the following assertions on page 4 of their factual statement:

> Because tensions were running high between Wilbanks and the band, it was feared that Wilbanks might actually harm someone. By mid-October 1992, Wilbanks had focused increasingly more hostility at Jon. On October 16, Wilbanks verbally abused and ridiculed Jon in front of others. This public ridicule and abuse began taking its toll on Jon, and continually decreased his ability to perform well.

Because the above statements alleging Wilbanks' increased hostility towards Jon, public ridicule of Jon and resulting decrease in Jon's ability to perform well are not supported in the record and were not available to the district court or the court of appeals in this case, such statements should not provide any basis for a decision on the petition in this case.

Petitioners provide an incomplete account of the TEA investigation results on pages 4-5 of their petition. Contrary to the impression left by Petitioners' statement of facts, the TEA expressly refused to sustain any of Petitioners' four allegations. (Pet. App. 33). The TEA investigation also specifically revealed that the "rumor" Petitioners allude to on page 4 was unsubstantiated because there was no evidence that Wilbanks and Principal Curry forced the assistant band director McSpadden to write a letter and McSpadden felt no pressure to sign any document with which he strongly disagreed. (Pet. App. 31). Any references to findings made in the TEA investigation should be read in conjunction with the

agency's conclusions provided as an appendix to the petition. (Pet. App. 30-33).

Finally, Petitioners provide no record reference for the proposition that despite an order of reassignment, the administration allowed Wilbanks to teach a percussion class at Oakwood Middle School. (Petition at 5). Such information was not provided to the district court nor to the court of appeals in this case, nor is such information contained either in the TEA investigation or Petitioner Joyce Yvonne Shinn's affidavit. (Pet. App. 13-33). Likewise, Petitioners' conclusion that the Board ratified Wilbanks' actions and "systems" by reinstating him to the classroom is a legal conclusion unsupported by any facts in the TEA report, Joyce Yvonne Shinn's affidavit or the Petitioners' first amended complaint. (Petition at 5). Both references should be disregarded by this Court as unsupported by the record in this case.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Fifth Circuit properly affirmed entry of summary judgment in favor of Respondents and ordered that reasonable attorney's fees and double costs be awarded to Respondents for defending Petitioners' frivolous appeal of legal points not arguable on the merits. Petitioners stated no recognizable cause of action under federal law or the Texas Constitution because Petitioners failed to show a violation of a clearly established constitutional right. Furthermore, the individual Respondents are immune from suit under the Doctrine of Qualified Immunity based upon

their official capacities with a local school district of the State of Texas. The entire dispute between the parties rests upon Petitioners' perception that Wilbanks exhibited "unprofessional behavior" as band director which resulted in a "poor year for the band" and "the infliction of severe emotional distress upon many of the [unidentified] students, including Jon Shinn." (Pet. App. 8-9). Because Petitioners have cited no authority for their position that Jonathan Shinn's constitutional rights have been violated, the writ of certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS FAILED TO STATE A PROPER CLAIM UNDER 42 U.S.C. § 1983.

To establish their position that Texas law creates a constitutional claim under 42 U.S.C. § 1983, Petitioners rely only on a recent Texas state court decision, *Spacek v. Charles*, 928 S.W.2d 88, 93 (Tex. App. – Houston [14th Dist.] 1996, n.w.h.). In *Spacek*, a student sued his high school athletic coaches, asserting federal and state claims related to the coaches' behavior, including alleged threats, use of physical force and placing a gun against the student's head. The *Spacek* court first recognized that Section 1983 imposes liability for violations of rights protected by the United States Constitution, but not for violations of duties of care arising under state tort law. *Id.* at 92. The court then affirmed the lower court's denial of defendants' motion for summary judgment on two of the plaintiff's four constitutional claims because the defendants did not address those two claims in the district

court. *Id.* at 93-94. Procedurally, these two constitutional claims were not subject to summary judgment.

The *Spacek* decision does not stand for the proposition that there is a recognized liberty interest to be free from emotional harassment caused by intentional and/or reckless behavior. To the contrary, the *Spacek* court holds that mere words – however violent – do not constitute a simple assault and do not rise to the level of a constitutional violation of a liberty interest under Section 1983. *Id.* at 93. The *Spacek* court also held that whether an injury is more than *de minimis* so as to implicate a constitutional violation "is determined within the context of contemporary standards of decency, and not by the significance of the injury." *Id.* Only where there is a recognized constitutional violation is actual physical injury to the plaintiff not required. *Id.*[1]

Coach Spacek's motion for summary judgment on failure to state a claim under Section 1983 was denied not because the student established a violation of a recognized constitutional right, but rather because Spacek did not address the plaintiff's Fifth Amendment substantive due process and Fourteenth Amendment equal protection claims in his motion. *Id.* at 94. Coach Spacek thereby failed to meet his burden to prove immunity as to those claims. *Id.* Furthermore, the record in *Spacek* reflected a

---

[1] In the "injury" portion its opinion, the *Spacek* court relied exclusively on *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 304 (5th Cir. 1987), a case where a student was tied to a chair for two days in school. The *Ysleta* case was addressed and distinguished on its facts in both Respondents' brief on appeal and in oral argument before the court of appeals in this case.

fact issue regarding whether the coaches' actions went beyond mere words in disciplining the student with respect to the plaintiff's Fourth and Eighth Amendment claims. *Id.* at 93.

The *Spacek* opinion was decided after the district court granted Respondents' motion for summary judgment in this case, but before oral argument in the court of appeals. Petitioners chose not to cite or rely upon *Spacek* in the court of appeals. Nevertheless, the *Spacek* decision does not recognize a liberty interest to be free from emotional harassment caused by intentional and/or reckless behavior or severe emotional distress.

On March 28, 1995, in its lengthy *Order* granting defendants' Motion for Summary Judgment in the instant case; the district court concluded:

> Personality disputes and problems with teachers throwing away [band] equipment do not rise to the level of rights so fundamental as to call Constitutional jurisprudence into play. 42 U.S.C. § 1983 was enacted as part of the Ku Klux Klan Act in 1871 to provide a federal forum for the formerly enslaved, and has expanded to embrace the ideals of a nation, not to settle what is basically a local, school district-governed dispute.
>
> The Court declines Plaintiff's invitation to include the right to be free from mean teachers, if such vengeful behavior in fact existed, on the list of fundamental rights the United States Supreme Court has found to be protected by substantive due process. Matters such as ineffective teaching and personality conflicts are best

> addressed by local school boards and not by federal courts.

(App. 14a). The instant case does not involve a student threatened with death by hanging, as in *Spacek*, but rather is one of an off-beat band director and a student who wanted to play *many* band instruments – not just the b-flat clarinet as Wilbanks had, in his discretion, decided. (Pet. App. 13). The court of appeals correctly noted that Petitioners conceded at oral argument that this case is not one that implicates the Texas Constitution. (Pet. App. 12). Likewise, nothing in the *Spacek* decision changes the unavailability of claims for Petitioners under the United States Constitution. *Spacek* does not support Petitioners' claim that their constitutional rights have been violated. The court of appeals correctly held that Petitioners failed to state a claim under Section 1983.

I.A.

Petitioners Failed To State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Liberty Interest in Being "Free from Emotional Harassment."

In their petition for writ of certiorari, Petitioners cite several cases for the proposition that Jonathan Shinn had a constitutional liberty interest in being free from emotional harassment. Each of these cases involves severe physical abuse *much* graver than the "misbehavior" characterized by Petitioners in this case. It is illogical for Petitioners to suggest that Wilbanks' conduct is akin to the sexual molestation of a student that occurred in *Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 130 L.Ed.2d 25, 115 S.Ct. 70 (1994). Similarly, the

severe physical abuse at issue in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987), where a teacher lashed a second grade student to a chair for two days, without breaks, is also well beyond the scope of Petitioners' allegations. When viewed alongside *Lopez v. Houston I.S.D.*, 817 F.2d 1351 (5th Cir. 1987), where a school employee failed to intervene in the beating of a student on the school bus by a third person, Wilbanks' letting band students stay up late on an overnight trip pales by comparison. (Pet. App. 17). Each of these cases cited by Petitioners involves physical harm more severe than the alleged "lack of leadership and discipline" and to the Petitioners' "alleged extreme dissatisfaction with Wilbanks' performance as band director." (Pet. App. 7-8). After considering the case law cited by Petitioners, the district court held there is no constitutional "right to be free from mean teachers." (Appendix 14a). The court of appeals disapproved of grafting the rights recognized in *Doe, Ysleta* and *Lopez* onto the instant case by holding that there is "no constitutional right to be free from emotional distress." (Pet. App. 9). Petitioners' continued repetition of their claims in each successive appellate forum cannot alter their inability to support their claims under state or federal law.

I.B.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Liberty Interest in Being Free from Punishment Absent Personal Guilt.

The right to be free from punishment absent personal guilt is actionable under 42 U.S.C. § 1983 only when that

punishment deprives the plaintiff of a constitutionally protected right. (Pet. App. 9). Petitioners made no such allegation in this case. Petitioners base their entire argument that Jonathan Shinn has a liberty interest in being free from punishment absent personal guilt on one case that was decided over 20 years ago in the United States Court of Appeals for the Fifth Circuit – *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974).

The *St. Ann* case is distinguishable from the present case because it involved a written school board regulation providing that students could be suspended or punished by reason of their parents' conduct, which the court found to be unconstitutional. *Id.* at 428. In the instant case, the district court agreed with Respondents' distinction that Petitioners' allegations involve neither a written school board policy nor punishment in the form of suspension from school. (Appendix 10a-11a). The court of appeals likewise held that the right to be free from punishment absent personal guilt is only actionable when that punishment deprives the plaintiff of a constitutionally protected right. (Pet. App. 9). Because Petitioners in this case do not allege facts sufficient to prove that punishment has deprived them of a constitutionally protected right, Petitioners' claims fail.

I.C.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Exercise of His Right to Protected Speech.

The court of appeals noted that Petitioners "have not alleged what speech Jonathan engaged in, nor have they

alleged facts indicating that Wilbanks' action amounted to retaliation or infringement on Jonathan's first amendment rights." (Pet. App. 10). Therefore, the court of appeals correctly held that Petitioners failed to state a proper claim under 42 U.S.C. § 1983 regarding Jonathan Shinn's alleged exercise of his right to protected speech. In assigning such error, Petitioners fail to allege, even at this late date, what speech Jonathan may have exercised that infringed on his First Amendment rights. Petitioners cite only one record reference – the affidavit of Yvonne Shinn – for the proposition that "Jonathan Shinn reported Wilbanks' behavior to his mother." (Pet. App. 13). Petitioners state that "it is a reasonable inference that Wilbanks deduced Jonathan Shinn to have been of [sic] reporter of his, Wilbanks', school behavior and thus a source of his problems" and then infer that Wilbanks punished Jonathan Shinn for making a report to his mother. (Petition at 13-14).

The tenuous causal relationship proposed by Petitioners does not illuminate what speech Jonathan Shinn may have uttered "to his mother" or whether any such speech deserves constitutional protection. Petitioners also fail to allege any facts indicating that Wilbank's actions amounted to retaliation or infringement on Jonathan's First Amendment rights. (Pet. App. 10), *citing Haverkamp v. Unified Sch. Dist. No. 380,* 689 F.Supp. 1055, 1058-59 (D.Kan. 1986) (dismissing plaintiff's First Amendment claim where the complaint did not indicate retaliation by school officials or a restriction of plaintiff's First Amendment rights); *see also Wilson v. UT Health Center,* 973 F.2d 1263, 1270 (5th Cir. 1992) (upholding directed verdict on

First Amendment claim because plaintiff produced insufficient evidence that certain defendants "retaliated against her for her speech"), *cert. denied*, 507 U.S. 1004 (1993). Finally, Petitioners fail to cite any authority for the proposition that a student's complaints to his mother and the possible consequences of such complaints deserve constitutional protection. Because Petitioners gave the court of appeals no evidence of any speech Jonathan Shinn may have uttered nor evidence that would indicate retaliation for any such speech, Petitioners' claims regarding free speech must fail.

I.D.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Respondents Wilbanks, Chancellor, Curry and Dornburg' Entitlement to Qualified Immunity.

The court of appeals found that because Petitioners have failed to establish the violation of a clearly established constitutional right, the Respondents, in their individual capacities, are entitled to qualified immunity. (Pet. App. 12), *citing Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir.) (stating standard for qualified immunity), *cert. denied*, ___ U.S. ___, 116 S.Ct. 532 (1995). Petitioners do not point to claims in their petition that would establish the violation of a clearly established constitutional right. Instead, Petitioners merely cite the objective test for application of qualified immunity – whether "a constitutional right is clearly established if in light of pre-existing law the unlawfulness is apparent" – that is based on this Court's holding in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As established in *Anderson v. Creighton*,

immunity may be waived if the constitutional right the official is alleged to have violated is "clearly established," in the sense that a reasonable official would understand that what he is doing violates that right, and in light of pre-existing law the unlawfulness must be apparent. *Id.* If both the district court and the court of appeals were unable to recognize the constitutional rights Petitioners claim were violated in this case, it follows that a reasonable official would not be able to understand that what he is doing violates the alleged rights, in light of the law existing at the time the complained-of events took place.

Even the *Spacek* trial court, which Petitioners argue created a constitutional right applicable to this case, *granted* the school district's motion for summary judgment on its immunity defense under facts involving death threats toward a student. Summary judgment was denied for the remaining defendant school coaches in *Spacek* because there was a question of fact concerning their use of excessive force (*i.e.*, holding the student in a headlock, threatening to kill him by pointing a gun to his head and reaching for an electrical cord to hang him). The denial of the coaches' motions for summary judgment based on their qualified immunity defense was affirmed in part (as to Fifth and Fourteenth Amendment claims) and reversed in part (as to those claims not properly raised in the trial court – the Fourth and Eighth Amendment claims).

The United States Court of Appeals for the Fifth Circuit in several recent decisions has upheld the immunity defense on claims similar to the present claims by Petitioners. In *Eugene v. Alief Independent School District*, the court of appeals affirmed the district court's dismissal

of plaintiffs' claims of federal and constitutional violations against the school district and school officials because there could be no state constitutional tort claims and plaintiffs did not show that the school district acted in accordance with any official policy. 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 134 L.Ed.2d 782, 116 S.Ct. 1680 (1986). Likewise, in *Lopez v. Houston Independent School District*, the court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and its officials because there was no evidence of any official policy or widespread practice throughout the district which deprived constitutional rights and plaintiffs could not bring suit against the district's officials in their individual capacities. 817 F.2d 1351 (5th Cir. 1987). Both of the foregoing cases were brought by plaintiffs who were represented by Petitioners' counsel in this case.

Even if this Court were to find a violation of a constitutional right, Petitioners have never alleged and do not now allege that Respondents Wilbanks, Chancellor, Curry and Dornburg acted pursuant to an official custom or policy of the Respondent school district, or that the school district implemented such an official custom or policy. Based upon such failure to allege that Wilbanks, Chancellor, Curry and Dornburg acted pursuant to an official custom or policy of the school district, or that the school district implemented such an official custom, the court of appeals found that there could be no Section 1983 liability for the school district or for the Respondents in their individual capacities. (Pet. App. 12), *citing Meadowbriar Home For Children, Inc. v. Gunn*, 81 F.3d

521, 533 (5th Cir. 1996). Without more than blanket assertions that constitutional rights have been violated, there can be no liability for any of the individual Respondents in their official capacities.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS' APPEAL WAS FRIVOLOUS

In their petition, Petitioners recognize that a "frivolous appeal is one which involves legal points not arguable on the merits." *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985), *cert. denied*, 493 U.S. 818 (1989). Frivolous appeals are disfavored because "[o]ur society in general, and appellate courts in particular, labor under a heavy burden of litigation which is 'needlessly aggravated when frivolous appeals are taken.' " *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984), *citing United States v. Santa Fe Engineers, Inc.*, 567 F.2d 860, 861 (9th Cir. 1978) (per curiam). The standard for the imposition of penalty for pursuing a "frivolous appeal" is whether the appeal is found groundless, without foundation and without merit, regardless of whether it was brought in bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 421 (1978).

Petitioners assert that their appeal to the Fifth Circuit was based upon arguable and valid legal points, presumably that Petitioners have constitutionally protected interests under state and federal law that have been violated. However, Petitioners argued to the court of appeals that "an appeal which simply lacks merit is not always frivolous," effectively conceding that their appeal lacked

merit. Appellants' Response to Court's Order to Show Cause, or, alternatively, Petition for Rehearing at 4, *citing Crain v. C.I.R.*, 737 F.2d 1417, 1418 (5th Cir. 1984). In presenting Question No. 2 to the Court, Petitioners provide no support for their blanket statement that their appeal to the Fifth Circuit was based on arguable and valid legal points. The court of appeals recognized in footnote 1 of the October 3, 1996 opinion in this case that:

> [T]he attorney who brought this appeal did not appear at oral argument. Instead, he sent a colleague who conceded at oral argument that the Plaintiffs' claims under the Texas Constitution were without merit.

(Pet. App. 12). Petitioners now contend that they should not be burdened with the consequences of pursuing issues first on appeal and now on Petition for writ of certiorari which were "conceded" at oral argument as being without merit, regardless of whether they were brought "in good faith."[2]

In the court of appeals, Petitioners' counsel stated that his clients requested an appeal in this case, which he felt obligated to pursue, to his and his clients' ultimate detriment. Petitioners' counsel argued that he had a duty to appeal as follows:

> It is the client who determines whether an appeal shall be taken. 7A C.J.S. § 203, citing *Hawkeye-Security Ins. Co. v. Indemnity Ins. Co. of North America*, 260 F.2d 361, 363, 91 A.L.R.2d 618

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[2] A list of reported cases over the past 10 years in which Petitioners' counsel brought claims identical to the claims he has brought in this case. In each case, Petitioners' counsel's claims were rejected on appeal. *See* Appendix C.

> (10th Cir. 1958). See *Jones v. Banner Creamery*, 214 S.W.2d 487 (Tex. Civ. App. 1948); *Ex Parte Wood*, 87 S.W.2d 487 (Tex. Crim. App. 1935); *Ex Parte Maple*, 33 S.W.2d 734 (Tex. Crim. App. 1930). In this case, the client, Plaintiff-Appellants, requested an appeal. Accordingly, counsel for Plaintiff-Appellants submitted their appeal in good faith, and based on issues of substance. "An attorney authorized to take appellate proceedings cannot abandon or withdraw the same after they have been taken." 7A C.J.S. § 203. Counsel had no intent to offend this Court by complying with Plaintiff-Appellants' wishes, and submitting the appeal. Therefore, counsel for Plaintiff-Appellants respectfully request the Court to forego punishment, and find that this appeal was substantive such that it did not rise to the level of frivolous.

Appellants' Response to Court's Order to Show Cause, or, alternatively, Petition for Rehearing at 11. Despite the foregoing argument, Petitioners' counsel has no right, let alone a duty, to bring a frivolous appeal in Texas. TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 3.01, 3.02 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit 2 subtit. G app. (Vernon Supp. 1996) (State Bar Rules art X, § 9). One guideline for Texas attorneys' conduct is The Texas Lawyers' Creed which provides "I will advise my client that we will not pursue any course of action without merit." The Supreme Court of the State of Texas, *The Texas Lawyer's Creed – A Mandate for Professionalism* (November 7, 1989). After a judgment has been entered, an attorney has the duty and obligation to (1) advise a client of the *right* to file an appeal of an adverse judgment and (2) to inform the client whether the attorney will pursue the appeal.

An experienced civil rights attorney must be accountable for maintaining a "plainly baseless suit" and "charging forth with the litigation in disregard of its manifest lack of merit." *Blue v. United States Dept. of the Army*, 914 F.2d 525, 546-48, 550 (4th Cir. 1990), *cert. denied*, 499 U.S. 959, 111 S.Ct. 1580 (1991) (upholding sanctions award of reasonable attorneys' fees and double costs against an experienced and distinguished litigator). Petitioners' counsel over the past ten years has brought at least ten reported cases before the Court of Appeals for the Fifth Circuit on similar, if not identical, claims. (See App. C). In each case, the claims and Appellants' counsel's arguments on appeal synonymous to those presented in this case were rejected by the court of appeals. To date, this Court has not granted *certiorari* in any such case and denied *certiorari* in two of the cases.

The standard for determining whether an appeal is frivolous is whether "the court of appeals determines that an appeal is frivolous." FED R. APP. P. 38. In this case, the court of appeals made the determination that Petitioners' appeal was frivolous and that counsel failed to show cause why sanctions should not issue. Under the applicable "abuse of discretion" standard, this Court should deny Petitioners' request for certiorari on this issue and allow the decision of the court of appeals to stand.

CONCLUSION

Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

Counsel of Record for Respondents
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APPENDIX A

SHINN v. COLLEGE STATION INDEPENDENT SCHOOL DIST.

Yvonne SHINN, on behalf of Jonathan Daniel SHINN; John Eugene Shinn, on behalf of Jonathan Daniel Shinn, Plaintiff-Appellants.

v.

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT; Kenneth Wilbanks; Ray Chancellor; Bob Curry; William Dornburg, Defendants-Appellees.

No. 95-20328.

United States Court of Appeals,
Fifth Circuit.

Nov. 22, 1996.

Appeal from the United States District Court for the Southern District of Texas, John D. Rainey, Judge.

ON PETITION FOR REHEARING

(Opinion Oct. 3, 1996, 5th Cir., 1996, 96 F.3d 783.)

Before GARWOOD, EMILIO M. GARZA and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion for leave to file request for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED. The court has reviewed the authority cited in the petition and finds that none raises disagreements with a high school band director to the level of a violation of the First or Fourteenth Amendments.

IT IS FURTHER ORDERED that, counsel having failed to show cause why sanctions should not issue, double costs and reasonable attorney's fees are hereby awarded to Defendants pursuant to FED.R.APP.P. 38. Defendants should submit to this court their attorney's fees statement and costs within two weeks of entry of this order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JOYCE YVONNE SHINN and JOHN EUGENE SHINN, on behalf of JONATHAN DANIEL SHINN,	§	CIVIL ACTION NO. H-93-3055
Plaintiff	§	
VS.	§	
COLLEGE STATION I.S.D., et al,	§	(Filed Mar. 30, 1995)
Defendants.	§	

ORDER

Pending before this Court is a Motion for Summary Judgment (Docket Entry #22) filed by Defendants College Station Independent School District, Kenneth Wilbanks, Ray Chancellor, Bob Curry and William Dornburg, all in their independent and official capacities (collectively, "Defendants"). After consideration of the pleadings, the responses, and the applicable law, it is the Court's opinion that this motion be GRANTED.

I. Statement of the Case

Plaintiff Jonathan Daniel Shinn ("Plaintiff") was a freshman member of the A & M Consolidated High School Band. Plaintiff, through his parents and their lawyer, filed a complaint in this Court alleging that his Constitutional rights were violated by Defendant Kenneth Wilbanks' behavior as A & M Consolidated's Band

Director. Plaintiff alleges eight full pages of wrongs perpetrated by Wilbanks, ranging from his alleged "insistence" that Plaintiff play only the B-flat clarinet to his alleged "showing [of] disrespect" to the assistant band director to failing to hand out band rules until six entire weeks after the start of practice and failing to provide parents with "information" about the marching band competition in Killeen, Texas – which resulted in Plaintiff's parents arriving at the competition four hours and fifteen minutes early. Plaintiff claims that Wilbanks did not handle the school's band instruments properly, and that Plaintiff was "yelled at" when he tried to turn in his instrument. Plaintiff further alleges that other students – who notably do not join this complaint – were mistreated by Wilbanks, and that Wilbanks on at least one occasion yelled at Plaintiff more than the other students. All in all, Plaintiff complains, the band had "a bad year." Plaintiff then, on the basis of these alleged incidents, proceeded to file a federal lawsuit claiming causes of action under the First and Fourteenth Amendments to the United States Constitution (brought pursuant to 42 U.S.C. §1983) and under the Texas Constitution. Plaintiff has also requested attorney's fees pursuant to 42 U.S.C. §1988. Defendants have moved for summary judgment on all causes of action.

II. Summary Judgment Standard

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See id.*, 477 U.S. at 323-28, 106 S.Ct. at 2553-54; *International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2553.

If the movant satisfies this *prima facie* burden, the burden shifts to the nonmovant, who must "set forth facts showing that there is a genuine issue for trial." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Willis v. Roche Biomedical Labs, Inc.*, 21 F.3d 1368, 1371 (5th Cir. 1994). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586-87, 106 S.Ct. at 1356. When the facts presented by the nonmovant could not "lead a rational trier of fact to find for the nonmoving party," there "is no genuine issue for trial." *Id.*

When considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254, 106 S.Ct. at 2513. The standard for summary judgment "mirrors the standard for a [motion for judgment as a matter of law][1] under Federal Rule of Civil Procedure 50(a)." *Id.*, 477 U.S. at 250, 106 S.Ct. at 2511. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*, 477 U.S. at 255, 106 S.Ct. at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 257, 106 S.Ct. at 1356. Summary judgment is appropriate if "under the governing law, there can be but one reasonable conclusion as to

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[1] FED. R. CIV. P. 50(a) and (b) were amended, effective Dec. 1, 1991, to create a single motion for "judgment as a matter of law," available to the parties conducting a jury trial, which if denied, the moving party may renew after trial. Prior to the amendment, a Rule 50(a) preverdict motion was termed a motion for "directed verdict," while a postverdict motion was termed a motion for "judgment notwithstanding the verdict." The change in the rule has not altered the substantive standard that governs whether a party to a jury trial is entitled to judgment as a matter of law – the nonmovant must "ha[ve] been fully heard on an issue," and there must be "no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmovant] on that issue." FED. R. CIV. P. 50(a) & advisory committee's 1991 note ("The term 'judgment as a matter of law' is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules . . . . It effects no change in the governing standard.").

the verdict;" if "reasonable minds can differ as to the import of the evidence," however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250-51, 106 S.Ct. at 2511. *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 855 (5th Cir. 1993).

III. Analysis

A. Claims Under the Texas Constitution

As previously noted, Defendants have moved for summary judgment on all counts. Plaintiff has alleged that Defendants have violated his rights under both the United States Constitution and the Constitution of Texas. The Court first notes the Texas Supreme Court recently held that Texas law does not recognize a "constitutional tort" analogous to 42 U.S.C. §1983 or a Bivens-type action entitling the pursuit of a private cause of action for damages. *City of Beaumont v. Bouillion*, ___ S.W.2d ___, 1995 WL 64173, *5 (February 15, 1995). The Fifth Circuit and other Texas courts have taken the same position. *See, Gillum v. City of Kerrville*, 5 F.3d 117, 122 (5th Cir. 1994) (cert. denied, ___ U.S. ___, 114 S.Ct. 881 (1994); *Bagg v. Univ. of Tex. Medical Branch*, 726 S.W.2d 582, 584 n.1 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.) (citations omitted); *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 839 (Tex.App.– Austin 1993, writ denied); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 872-3 (Tex.App. – Amarillo 1993, writ denied); *Tutt v. City of Abilene*, 877 S.W.2d 86, 88 (Tex. App. – Eastland 1994, writ requested). This Court declines Plaintiff's invitation to break new ground in Texas case law. Summary judgment should be

granted on Plaintiff's claims under the Texas Constitution.

B. Claims Under The United States Constitution

Plaintiff has stated his causes of action under two headings: (1) "Liberty interest" and (2) "Freedom of Speech." Under Liberty Interest, Plaintiff claims (a) a "consistently (sic) protected liberty interest to be free from emotional harassment caused by the intentional an(sic)/or reckless behavior of Defendant Wilbanks;" (b) "the right to be free from punishment absent personal guilt for exercising his freedom of speech" and (c) "the reckless behavior of all the defendants violated [his] constitutional rights by failing to protect him against emotional distress and harassment." Under Freedom of Speech, Plaintiff claims (a) "a constitutionally protected right to be free from retaliation motivated by the exercise of his freedom of speech" and that (b) "[he] was directly retaliated against . . . for his parents, involvement with the TEA investigation and resulting newspaper article."[2]

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[2] The Court notes that although the complaint states that his *parents* were the people who spoke out about the band director, Plaintiff appears to be asserting that he has a Constitutionally-protected right to be free from retaliation from exercising *his* right to free speech. As the Court is bound to draw all inferences in favor of the nonmovant, the Court will examine this claim as stated.

1. "Liberty Interest" Claims

42 U.S.C. §1983 allows private parties to bring suit in the federal courts to recover damages for violations of constitutional rights. As §1983 does not list those rights which are actionable, the extent of the rights protected has largely been left to the federal courts to define. In addition to the rights explicitly stated in the Constitution, the Fifth and Fourteenth Amendments have been interpreted to have substantive content and protect rights "that have little or no textual support in the constitutional language." *Bowers v. Hardwick*, 478 U.S. 183, 191 (1986). The United States Supreme Court has stated that the rights which qualify for "heightened judicial protection" are those "fundamental liberties that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed' " *Id.* at 191-92, quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Stated differently, these "substantive due process" liberties have been characterized as those freedoms that are "deeply rooted in this Nation's history and tradition." *Id.* at 192, quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

In *Bowers*, the Supreme Court counseled the lower courts to proceed with caution in expanding upon these fundamental liberties:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause . . . There should be great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise,

> the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers at 194-95.

Plaintiff asks this Court to find "the right to be free from emotional harassment caused by the intentional an(sic)/or reckless behavior of Defendant Wilbanks" and "the right to be free from punishment absent personal guilt for exercising his freedom of speech" to be among these fundamental rights. Plaintiff cites *Jane Doe v. Taylor ISD*, 15 F.3d 443 (5th Cir. 1994), *Gonzalez v. Ysleta ISD*, 996 F.2d 745 (5th Cir. 1993), and *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974) as support for his position that a constitutional case exists on these facts. However, the Court is in agreement with Defendants that the above-cited cases are clearly distinguishable. *Doe* and *Gonzalez* found that students have a constitutionally-protected liberty interest in being free from unwanted sexual advances by teachers. Plaintiff would have the court compare the case, under the best possible reading of the facts, of a band director being mean to him with sexual abuse. This we decline to do.

St. Ann involved school children who were suspended then transferred pursuant to a school district regulation after their mother struck an assistant principal. The author of this twenty-year-old 2-1 decision relied on criminal cases in reaching the decision that the children had the fundamental right to be free from punishment absent personal guilt. *St. Ann* has since been interpreted

as standing for the proposition that students have a property right in attending public school; the punishment (depriving them of attending school) thus amounted to a deprivation of a constitutionally-protected right. *Burris v. Willis ISD*, 713 F.2d 1087, 1093, n. 3 (5th Cir. 1983). The facts in this case, which are not in dispute, show that Plaintiff was not deprived of his right to attend school; moreover, the Court fails to see how being yelled at and scowled at more than the other students and being transferred pursuant to an official policy can be compared as "punishment."

Plaintiff's claim under "Liberty Interest" of "failure to protect" applies to the individual defendants and is discussed in Paragraph C below.

2. "Freedom of Speech"

After examining the responses to the motions for summary judgment it appears to the Court that this cause of action has fallen by the wayside. However, it was raised in the complaint and therefore will be addressed. This case has been styled from its inception "Joyce Yvonne Shinn & John Eugene Shinn *on behalf of* Jonathan Daniel Shinn." This has led the Court to believe that one plaintiff exists in this case, Jonathan Daniel Shinn. Subsequent filings in this case seem to indicate that his parents are also plaintiffs in their own right. However, the procedural confusion does not change the Court's opinion that the facts, viewed in the light most favorable to whomever the plaintiffs are, do not state a constitutional violation.

According to the complaint, Plaintiff's parents spoke to a local newspaper about the band director. The band director allegedly lectured the students about the newspaper story at a band meeting and "directed his comments at Jon Shinn." The cause of action "Freedom of Speech" says at (a) that "Plaintiff has a . . . right to be free from retaliation motivated by the exercise of his freedom of speech" then at (b) that "Plaintiff was directly retaliated against . . . for his parents' involvement." The court is unsure if "Plaintiff" is saying that he spoke and was punished for it (a fair reading of (a)) or that he was punished for his parents' speech (a fair reading of (b)). Suffice it to say that no facts were pled indicating that Jonathan Daniel Shinn spoke and was punished for his speech nor that his parents spoke and were punished for their speech, so no cause of action may be maintained under such a theory.

The Court believes that (b) must be a more accurate statement of Plaintiff's complaint: that the child has a constitutionally-protected right in not being retaliated against for his parents' speaking to the press about the band director. This cause of action looks strikingly like Plaintiff's earlier argument that he has a fundamental right to be free from punishment absent personal guilt. This cause of action fails again for the same reasons stated above.

C. Individual Defendants

Plaintiff has also sued Defendants Kenneth Wilbanks, Ray Chancellor, Bob Curry and William Dornburg in both their official and individual capacities, the latter three

apparently for "failing to protect" Plaintiff from the former's alleged "emotional harassment." The Court finds that suit against these defendants in their official capacities is tantamount to Plaintiff's suit against CSISD, which the Court has found meritless.

As to Plaintiff's suit against these defendants individually, qualified immunity shields state officials from individual liability under 42 U.S.C. §1983 unless the official's conduct violates "clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1981). The examination of a claim of qualified immunity involves a two-step process. The first inquiry is whether the plaintiff has alleged a violation of a constitutional right. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). The next step is to determine whether that right was clearly established at the time the events took place. *Id.* A review of the record reveals that Plaintiff has failed to allege any facts implicating these defendants individually in any violation of a clearly established constitutional right. The Court reiterates that the facts, of which there is no genuine issue, show that Plaintiff was not deprived of any substantive due process rights.

D. Attorney's Fees

Since the Court has found that Plaintiff's civil rights claims fail in their entirety, Plaintiff's claim for attorney's fees must also fail, as he is not a prevailing party. *See, Farrar v. Hobby,* ___ U.S. ___, 113 S.Ct. 566 (1992); *Pembroke v. Wood County,* 981 F.2d 225, 230 (5th Cir. 1993) *cert. denied,* 113 S.Ct. 2965 (1993).

IV. Conclusion

Personality disputes and problems with teachers throwing away equipment do not rise to the level of rights so fundamental as to call Constitutional jurisprudence into play. 42 U.S.C. §1983 was originally enacted as part of the Ku Klux Klan Act in 1871 to provide a federal forum for the formerly enslaved, and has expanded to embrace the ideals of a nation, not to settle what is basically a local, school district-governed dispute. *See, Monroe v. Pape,* 365 U.S. 167, 174-175 (1961). As the Sixth Circuit has stated, "[S]ubstantive due process is not concerned with the garden variety issues . . . [it] affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . " *Charles v. Baesler,* 910 F.2d 1349 (6th Cir. 1990) (internal quotations omitted).

The Court declines Plaintiff's invitation to include the right to be free from mean teachers, if such vengeful behavior in fact existed, on the list of fundamental rights the United States Supreme Court has found to be protected by substantive due process. Matters such as ineffective teaching and personality conflicts are best addressed by local school boards and not by federal courts.

The Court finds that there is no genuine issue of material fact as to whether Plaintiff's constitutional rights were violated, and that Defendants are entitled to judgment on each of these claims as a matter of law.

For the foregoing reasons, it is ORDERED that Defendant's Motion for Summary Judgment be GRANTED.

The Clerk shall enter this Order and provide a true copy to all parties.

Signed this 28th day of March, 1995.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

The following is a list of reported cases over the past 10 years in which Petitioners' counsel brought identical claims to those he brought in this case. In each case, Petitioners' counsel's claims were rejected by the court of appeals.

Fowler v. Smith and Angelton Independent School District, 68 F.3d 124 (5th Cir. 1995):

> Plaintiff's claims for violations of First Amendment freedoms and substantive and procedural due process against school district, superintendent and other school officials. The district court's summary judgment for defendants was affirmed by the court of appeals.

Eugene v. Alief Independent School District,
65 F.3d 1299 (5th Cir. 1995),
cert denied, 134 L.Ed. 782, 116 S.Ct. 1680 (1996):

> The court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and school officials because there can be no state constitutional tort claims and plaintiffs did not show that the school district acted in accordance with any official policy.

Continental Casualty Company v. McAllen Independent School District,
850 F.2d 1044 (5th Cir. 1988) (*per curiam*):

> The court of appeals rejects student's claim that the injuries to his body (burns suffered at school) were "constitutional" and therefore, not excluded under the school district's liability policy exclusion for bodily injury. The district

court's judgment that school district's liability policy does not cover the student's damages is affirmed.

Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988):

District court denied individual defendant's motion for summary judgment based upon the defense of qualified immunity from plaintiff's claims for violation of First Amendment freedoms. Stating that plaintiff's "case remains once of nuance" and that "no Fifth Circuit case as of 1981 has found a first amendment violation on facts like these," the court of appeals reversed and remanded for judgment in favor of the defendants.

Lopez v. Houston Independent School District, 817 F.2d 1351 (5th Cir. 1987):

The court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and its officials because there was no evidence of any official policy or widespread practice throughout the district which deprived constitutional rights and plaintiffs could not bring suit against the district's officials in their individual capacities.

Montgomery v. Trinity Independent School District, 809 F.2d 1058 (5th Cir. 1987):

Plaintiff claimed her probationary contract was not renewed in retaliation for her disagreement with policies, involvement in a Texas teachers' association and for her husband's "outspokenness" regarding tax measures. The district court granted a directed verdict for the school district

and its officials. The court of appeals affirmed because the teacher failed to present any facts in support of her allegations.

McAdams v. Matagorda County Appraisal District,
798 F.2d 842 (5th Cir. 1986):

Plaintiff sued the district and its board members for terminating him for the exercise speech protected by the First Amendment. The district court granted summary judgment for defendants on plaintiff's due process claim and entered judgment not withstanding the verdict on the free speech claim. The court of appeals affirmed noting that plaintiff made only private statements to the board.

Thomas v. Harris County,
784 F.2d 648 (5th Cir. 1986) (per curiam),
cert denied, 122 L.Ed. 669 113 S.Ct. 1275 (1993):

Plaintiff claimed he was transferred for criticizing the police department and brought suit for violation of his constitutional rights and conspiracy against the county, the city, the police department, the district attorney, the mayor, the chief of police, the former chief of police, various city officials and a subdivision association. The district court granted summary judgment for the defendants. Summary judgment affirmed by the court of appeals for those defendants against whom no claims were made and who were immune from liability.

Kline v. North Texas State University,
782 F.2d 1229 (5th Cir. 1986):

Plaintiff college professor brought suit for constructive discharge in violation of his First Amendment rights against university and its

officials for "failing to act." The court of appeals reversed and rendered the jury's verdict for the plaintiff based on the expiration of the statute of limitations and plaintiff's failure to show how the defendants created any "intolerable situation" or failed to exercise any applicable duty.

Langoria v City of Bay City, Texas,
779 F.2d 1136 (5th Cir. 1986):

Homeowners brought suit against city and various city officials for conspiracy to deprive them of constitutional property rights through fraudulent representations. The district court granted summary judgment based on limitations. The court of appeals affirmed and did not reach the constitutional issues.
